In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

HENRY L. MITCHELL, GOVERNOR OF the State of Florida, et al., as the board of trustees of the Internal-Improvement Fund of the State of Florida, et al., appellants,
v.
CHARLES M. FURMAN, ADMINISTRATOR, etc., et al., appellees.

No. 158.

BRIEF AND ARGUMENT FOR APPELLANTS.

STATEMENT OF THE CASE.

This case comes here on appeal from the interlocutory orders and final decree rendered by the circuit court of the United States for the southern district of Florida in chancery.

In October, A. D. 1895, Charles M. Furman, individually, and as administrator of Charles M. Furman, deceased, Bolivar B. Furman and Alester G. Furman, as heirs and holders under mesne conveyance from the heirs

of Charles M. Furman, deceased, filed their bill in equity against Henry L. Mitchell, governor of the State of Florida, and others holding the respective offices of comptroller, treasurer, attorney-general, and commissioner of agriculture of said State, and composing the board of trustees of the Internal-Improvement Fund of the State of Florida; The Florida Coast Line Canal Company; The St. Johns Railway Company; Horace S. Cummings, and John A. Henderson, alleging that complainants were the owners of Anastasia Island, containing 7,500 acres within townships 7, 8, and 9, range 30 east, except what was known in A. D. 1795 as the King's Quarries, "the boundaries of which were marked with stakes," containing about 200 acres "and lying on, and east of, the old King's Road, and between the same and the old lighthouse."

Complainants *darrain* title from one Jesse Fish, to whom they alleged the land was "granted" by the "Government" of Spain on the 19th day of June, A. D. 1795, and which grant they alleged was ratified and confirmed by the United States by the treaty of 1821.

Complainants averred that Fish was put in possession of the lands granted, and resided thereon from A. D. 1795 to his death, which, they allege, occurred in A. D. 1798; that until the present time claimants under Fish have occupied the Fish homestead on said island, and cultivated the fields thereon, and used the woodlands for fuel, and paid taxes on said property "when assessed for taxes," and exercised such acts of possession as the property was capable of, under claim of title.

That the United States, on the 18th of September, A. D. 1856, had patented to the State of Florida, under the act of September 28, 1850, about 1,500 acres of the lands on said island, and, in A. D. 1895, had patented to said State about 500 acres of said lands, under the act of June 9, 1880; and, in addition to the lands so patented, "said State has selected, under claims based upon the act aforesaid" (June 9, 1880), about 367 acres of said lands. The Canal Company, The St. Johns Railway Company, Horace S. Cummings, and John A. Henderson hold under deeds from the State of Florida.

That by act of the legislature approved January 6th, A. D. 1855, the State of Florida vested in the governor of the State, the comptroller, treasurer, attorney-general, and register of lands, and their successors in office as the board of trustees of the Internal Improvement Fund of the State of Florida, all lands granted by Congress under the act of September 28, 1850, with power of sale.

Complainants aver none of defendants to be in actual possession of any part of the lands in controversy; also that the cause involves the construction of the treaty between the United States and Spain, and arises under the same.

The bill prays that the patents, entries, and deeds under which defendants respectively claim title may be declared void as clouds on complainants' title, and for injunction and further relief.

The trustees and Cummings of the defendants appeared specially and moved to dismiss the bill for want of jurisdiction in the court to take cognizance.

The grounds of objection were on the 2d day of December, 1895, specified, and appear on page 11 of the record.

After argument the motion to dismiss was denied and defendants filed demurrers for want of equity and to the jurisdiction of the court (pp. 14 and 15 of record).

The demurrers were overruled, and separate answers were filed, the trustees and Cummings joining, and the railway and canal company making a joint answer (pp. 19 to 31 and 32 to 45 of the record).

A decree pro confesso was taken against the defendant John A. Henderson.

On July 27, 1896, the cause was referred to H. H. Buckman, esq., as special master, to take the evidence and report the same "with his findings of the law and facts," and on September 21, A. D. 1897, the master filed (1) his report of the testimony and findings (pp. 51 to 65 of record), and (2) his opinion (pp. 65 to 86 of record). Exceptions were filed to both the findings and opinion of the master, which, after argument, were overruled. The master's report was in all things confirmed, and on April 6, A. D. 1898, a final decree made granting the relief prayed in the bill, setting aside and declaring void the patents from the United States to the State of Florida (except as to 80 acres in section 28) and setting aside and declaring null and void the selections and entries of the State of Florida yet unpatented, as a cloud upon the title of complainants, and enjoining defendants and successors in office from taking possession of the lands described in the patents and deeds set aside, and decreeing that each party pay the costs incurred by them (pp. 98 to 100 of record).

From the orders made and decree rendered an appeal to this court was taken and allowed on the 6th day of July, A. D. 1898 (pp. 101 to 103 of record).

The defendants filed their assignment of errors as follows (pp. 103 to 106 of record):

(1) The court erred in denying the motion of defendants to dismiss the suit for want of jurisdiction and in taking jurisdiction of said cause.

(2) The court erred in overruling the demurrers of the defendants and requiring answers.

(3) The court erred in referring the whole cause, both questions of law and of fact, to the master without the consent of the parties.

(4) The court erred in confirming the report of the master in this, that the master in his reports of the testimony filed and made a part of his report admitted evidence over defendant's objection and refused to admit evidence offered by defendants, as follows:

(*a*) The master admitted over objection the testimony of Mr. Sanchez, in Exhibit G (p. 250 of record), to the question, "State the location of what was or is known as the quarries or King's quarries, on Anastasia Island."

(*b*) The master admitted over objection the petition of Sarah Fish, presented to the board of land commissioners, and copies of documents reported by said board to have been presented before them, and their report on said petition, taken from volume 4, American State Papers, pages 465–466, Duff Green's edition (pp. 125–126 of record).

(*c*) The master admitted over objection, Exhibit E, deed from Julia R. Furman, and Exhibit F, deed from

Irvine K. Furman (pp. 243 and 245, respectively, of record).

(*d*) The master admitted over objection, Exhibit L, the map of Hopkins. (Grounds of objection, p. 115 of record.)

(*e*) The master admitted over objection, Exhibit U, the certified copies of the original papers, purporting to be a concession to Jesse Fish of lands on Anastasia Island from the surveyor-general's office (pp. 265 to 278 of record).

(*f*) The master sustained exceptions to the testimony of the witness Rogero as to the location of the quarries (p. — of record).

(*g*) The master sustained exceptions to the testimony of the witness Dunham as to the handwriting in the county court docket and his evidence tending to prove said docket a record of the county court (p. 191 of record).

(*h*) The master sustained objections to the evidence offered of the list of Spanish governors, the period when incumbent, and the evidence that Quesada was appointed by the King (p. 197 of record).

(*i*) The master sustained objections to the admission in evidence of the law of Spain prohibiting the granting of islands to foreigners (pp. 197, 198 of record).

(*j*) The master sustained objections to the testimony of the witness Colee as follows: "The people have quarried stone ever since I was a boy; the public could cut stone on any part of Anastasia Island" (pp. 199 and 200 of record.)

(*k*) The master sustained objections to the testimony of the witness Colee that the Rodriguez grant on Anastasia

Island was occupied and built upon as a town settlement (p. 201 of record).

(*l*) The master sustained objections to the published reports of the register and receiver acting as a board of land commissioners (pp. 174, 175, 212–214 of record).

(*m*) The master sustained objections to the record from the General Land Office of the proceedings had before the Commissioner of the General Land Office, and on appeal before the Secretary of the Interior, in the case of Charles M. Furman, involving the claim of title to Anastasia Island (defendants' Exhibit No. 12, pp. 308 to 318 of record), and certified copies of the records from the General Land Office of proceedings relating to title to lands on Anastasia Island (defendants' exhibits 7 to 11, pp. 297 to 308 of record).

(*n*) The master sustained objections to the evidence offered that Sarah Fish died testate, and that her will was probated in St. Johns County, Fla. (pp. 151, 191, 206, 207, 216, 255, 291, 293 of record).

(*o*) The master sustained objections to the testimony offered by defendants that the published list of grants in east Florida, as published in the American State Papers, shows no other grant by Morales, and but two grants made by any other authority than the governor in person (p. 217 of record).

(*p*) The master sustained objections to the evidence offered by defendants that in the many sales by the Spanish Government of the property of Fish, sr., made at the time of the sale of the orange grove, the purchasers, except Jesse Fish, jr., took a deed to the several parcels of

property in absolute title, executed by the governor in the form set forth in Exhibit 31 (p. 218 of the record).

(*q*) The master sustained objections to the evidence offered by defendants that the originals of the title papers of Jesse Fish for lands on Anastasia Island, as they exist in the surveyor-general's office, is No. 17 of a bundle of one hundred loose unbound papers, marked "Memorials and concessions of land," and the same are mutilated and bear on their face marks casting doubt on their authenticity (pp. 216 and 223 of the record).

(*r*) The master sustained objections to the deed from the Spanish Government to Bartolome Sintas of lands bought at the judicial sale of property of Fish, sr., offered as evidence of the form of a royal title and of the form of the title in absolute property made to other purchasers save Fish, jr., who purchased at said sale (pp. 362–366 of record).

(*s*) The master sustained objections to the evidence from volume 5, American State Papers, pages 750 and 751 (Gales & Seaton's edition) of the direction of Governor Coppinger and Suavedra to furnish to the agent of the Duke of Alagon, the conditions under which the Spanish Government at different epochs granted land, and to furnish him an attested copy of each of the titles of proprietorship issued in each class, with the report made by the Spanish officials in compliance with such direction (p. 220 of record).

(5) The court erred in sustaining the findings of law and fact of the master over the exceptions thereto of the defendants Mitchell et al., the trustees, etc., numbered

from 1 to 42, inclusive, and printed on pages 86 to 91 of the record.

(6) The court erred in confirming the opinion and report of the master over the exceptions thereto of the defendants Mitchell et al., the trustees, etc., numbered from 1 to 65, inclusive, printed on pages 91 to 97 of the record.

(7) The court erred in making the decree dated the 6th day of April, A. D. 1898, and in decreeing the relief prayed in the bill, or any relief.

(8) The court erred in decreeing any relief against the State of Florida, the real defendant, sued through the trustees of the Internal Improvement Fund.

(9) The court erred in refusing to dismiss the bill at the hearing for the following reasons:

(*a*) Because by a correct construction of the treaty with Spain and the acts of Congress for the settlement of land claims in Florida, the statutes made by the United States barred the claim of complainants.

(*b*) Because the claim presented, if genuine, was made without authority.

(*c*) Because the grant, if genuine, was an inchoate grant.

(*d*) Because the concession presented was an undefined and unsegregated quantity of land, and the exception not established.

(*e*) Because no sufficient possession was proved.

(*f*) Because complainants proved title out of themselves.

(*g*) Because the evidence showed the claim had been determined adversely to the complainants in a tribunal

having jurisdiction of the subject-matter and parties at the request of complainants.

(10) The court erred in refusing to dismiss the bill at the hearing at the request of defendants.

NOTE.—Citations of Supreme Court Reports in parenthesis ( ) are from book and page of Lawyers' Cooperative Edition.

ARGUMENT.

The first assignment of error is the refusal to dismiss the bill for want of jurisdiction.

The grounds of the motion to dismiss for want of jurisdiction were by order of the court set forth by defendants (p. 11 of record).

The third, fifth, seventh, and eighth grounds there set forth will be considered.

The second paragraph of the bill states complainants' title as follows: "Your orators further show unto your honors that the said tract of land was *granted* by the Government of Spain to Jose or Joseph Fish * * * on or about the 19th day of June, A. D. 1795, which said *grant* was ratified and confirmed by the United States by the treaty with Spain," etc. It further appears from the bill that the lands claimed as a Spanish grant had been subdivided into sections and quarter sections by the public surveys. The bill set out each tract patented to the State "as described by the public surveys."

Under the rules of equity pleading that the nature of the conveyance under which the claim is made must be stated according to its legal effect, and that all pleadings are to be taken most strongly against the pleader (Story

Eq. Pl., sec., 37a, sec. 241), the averments of the bill amount to this, that an incomplete concession was made to Fish which the United States has refused to recognize.

The term "grant" comprehends concessions, and permissions to settle, whether evidenced by writing or parole.

Strother v. *Lucas*, 12 Peters, 436.
United States v. *Forbes*, 15 Pet., 183.
United States v. *Hanson*, 16 Pet., 200.

The survey of the lands according to the rules prescribed by the public-land laws, and the issuance of patents therefor, was prima facie, a determination by the United States that the concession made to Fish had not been recognized by the sovereign against whose rights the claim was sought to be enforced.

United States v. *Mitchell*, 9 Pet., 744.
United States v. *Repentigny*, 5 Wall., 208 (18–646).
McMiken v. *United States*, 97 U. S., 218.
United States v. *Hanson*, 16 Pet., 200–201.
Minter v. *Crommelin*, 18 How., 87 (15–279).

The court was required to take judicial notice that the public surveys were extended over these lands in 1834, if the bill had not set forth sufficiently what is the fact, that they had been surveyed as public lands, and not in the form prescribed for private grants.

The extension of the public surveys over the lands presupposes a determination in accordance with law that the lands are not private property.

Nofire v. *United States*, 164 U. S., 660.
Carpenter v. *Rannels*, 19 Wall., 146 (22–80).

It was a well-known historical fact that the United States acquired title to all the lands in Florida not

granted by the King of Spain, or his competent authorities in the name of the King, prior to the 24th of January, A. D. 1818, and that upon the transfer of the territory the duty devolved upon this Government as sovereign to determine between it and the private claimant which was the grantee from the common grantor.

United States v. *Arredondo*, 6 Pet., 736.
Treaty of February 22, 1819, article 2, article 8.
United States v. *King*, 7 How., 847.
United States v. *Forbes*, 15 Pet., 182.

It was equally a fact of which the court would take judicial notice that the United States had performed the duty imposed by the treaty and the law of nations, as also the manner of its performance, and that since the expiration of the several acts of Congress for the determination and settlement of private land claims in Florida this duty devolved upon the Commissioner of the General Land Office by law.

Constitution, article 4, sec. 3, par. 2.
Secs. 453 and 2447, Revised Statutes. Copp's Land Laws, 1882, vol. 1, pp. 64–68–69.
United States v. *Arredondo*, 6 Pet., 732.
Maguire v. *Tyler*, 75 U. S., 650 (19–320).
United States v. *Lawton*, 5 How., 28.
Knight v. *United States Land Company*, 142 U. S., 161 (35–985–6–8).
Carr v. *United States*, 98 U. S., 433.
Catholic Bishop v. *Gibbon*, 158 U. S., 155 (39–931–2–6).
United States v. *Marvin*, 3 How., 620.
Teschmaker v. *Thompson*, 79 Am. Decs., 157.

The bill avers a grant by Spain in 1795, ratified and confirmed by the treaty.

It has been repeatedly held by this court that complete grants were recognized by the treaty (article 2), and the incomplete grants or concessions ratified by the eighth article. "To this class of cases the eighth article of the treaty was understood to apply."

"These are the imperfect claims to which the eighth article of the treaty with Spain refers."

United States v. *Miranda*, 16 Pet., 159 (10–922).
United States v. *Wiggins*, 14 Pet., 350 (10–489).
United States v. *Mitchell*, 9 Pet., 734 (9–291).

It thus appearing upon the face of the bill that complainants were attempting to enforce an incomplete claim derived from a foreign government, which the United States had refused to recognize, the court should have dismissed the bill.

De La Croix v. *Chamberlain*, 12 Wheat., 599.
Menard v. *Massey*, 8 How., 306–7.
United States v. *King*, 3 How., 787.
Burgess v. *Grey*, 16 How., 62.

The averment of the bill was that the "grant" was confirmed by the treaty with Spain. That treaty confirmed all grants to the same extent (del mismo modo) that the same grants would be valid if Florida had continued under the dominion of the King of Spain.

Before the acts of Congress referring the question to the courts and authorizing suit against the Sovereign as owner of all the territory not granted prior to January 24, 1818, the extent that the several grants would have been valid if the King of Spain had continued in dominion was a mixed question of law and fact, determinable alone by the political department of the Government. From

May 23, 1828, to May 26, 1831, and from A. D. 1860 to A. D. 1875 (as to complete titles only) it was determinable by the courts, by favor of the Sovereign. The bill failed to aver a recognition of the alleged grant either by the political department of the Government or by the courts, and its averments disclosed the refusal of the Executive Department to give it recognition. The treaty giving the power and making it the duty of the United States to determine the extent to which this alleged grant was valid, and it appearing on the face of the bill that the United States had surveyed the lands as a part of the public domain, and issued patents therefor from time to time for more than thirty years, it was apparent that action by Congress was necessary to give validity to the claim; that the court was without power to grant the relief prayed upon the averments of the bill as to title, and consequently without jurisdiction, and the bill should have been dismissed upon motion. No standing in an ordinary judicial tribunal has ever been allowed to these claims until Congress has confirmed them. (*Menard's Heirs* v. *Massey*, 8 How., 307.)

The eighth ground for the motion to dismiss is that the claim as set out in the bill is barred by statute. The same objection was made by demurrer.

The statutes relied on by appellants are the act of May 23, 1828, and the act of May 26, 1830.

Act May 23, 1828. The first section confirms the Florida claims reported to Congress under its several acts beginning in 1822 to the extent of 1 league square. Section 2 restricts the confirmation to 1 league, and requires a relinquishment of all excess. Section 6 enacts

that *all* claims to land within the Territory of Florida, embraced by the treaty between Spain and the United States of February 22, 1819, which shall *not be finally settled under the foregoing sections*, of greater area than 1 league, not reported as forged, "shall be received and adjudicated by the judge of the superior court of the district (of Florida) within which the land lies," upon petition of claimant, with a proviso that no claim annulled by treaty or not presented to commissioners of the United States under the acts of Congress, shall be taken cognizance of by the courts.

The ninth section makes it the duty of the district attorney to report the cases in every case determined against the United States, and the duty of the Attorney-General to direct an appeal to be made to the Supreme Court in all cases decided against the United States, where the area exceeds 1 league square, and in all other cases if he deems the decision of the district judge erroneous.

The tenth section provides for a law agent to superintend the interests of the United States.

The twelfth section reads as follows:

> SEC. 12. *And be it further enacted*, That any claims to lands, tenements, or hereditaments *within the purview of this act*, which shall not be brought by petition before said court within one year from the passage of this act, or which, after being brought before said court, shall, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within two years shall be forever barred, both at law and in equity; *and no other action at common law, or proceeding in equity shall ever thereafter be sustained in any court whatever.*

The act of May 26, 1830, is entitled, "An act to provide for the final settlement of land claims in Florida."

The fourth section of this act provides "that all the remaining claims which have been presented according to law, and not finally acted upon, shall be adjudicated and finally settled" upon the same conditions, restrictions, and limitations in every respect as prescribed in the act of May 23, 1828.

Complainants met this statutory bar with two contentions—first, the statute did not apply to complete titles, which theirs was claimed to be; second, if it did embrace complete titles, the act requiring adjudication by a court was unconstitutional.

Did the act of May 23, 1828, apply to complete titles? Where the language of a statute is clear there is no room for construction. *Thornley* v. *United States*, 113 U. S., 310 (28–1000).

The words of the act of 1828 are "all claims to land within the Territory of Florida embraced by the treaty between Spain and the United States" not finally settled by the preceding provision of the act.

Where the legislature makes no exception the courts can make none.

French v. *Spencer*, 21 How., 228 (16–97).
Yturbide v. *United States*, 22 How., 290 (16–342).

Language not as comprehensive in the California act was held to comprehend every species of title. *United States* v. *Fossatt*, 21 How., 446 (16–186).

The court had no power to restrict the terms of the statute.

Warton v. *Hunter's Lessee*, 1 Wheat., 326.
Delessus v. *United States*, 9 Pet., 135.

Bank of Alabama v. *Dalton*, 9 How., 529.
Saltmarsh v. *Tuthill*, 12 How., 389.
Board, etc., v. *Rollins*, 130 U. S., 662.

Had there been any uncertainty in the language used, a construction embracing grants of every nature was necessary to protect the interests of the United States in the newly acquired Territory of Florida, and this court, in case of doubt, was bound to give it such construction.

Slidell v. *Grandjean*, 111 U. S., 412, p. 439 (28–329).
United States v. *Fisher*, 2 Cranch., 386.

Contemporary history proves that complete titles were within the act of May 23, 1828.

On the 17th of September, 1830, Juan Percheman filed in the district court of Florida his petition for an adjudication on his claim to 2,000 acres of land granted by Governor Estrada. The petition was heard in the district court, and a decree made that the claim was within its jurisdiction, and by virtue of the act of May 26, 1830, it was confirmed. The United States appealed from the decree to this court, where the cause was heard and reported in 7 Peters, 51.

Mr. Joseph M. White was of counsel for the appellee. Mr. White had, prior to 1830, been one of the commissioners for ascertaining titles to land in Florida under the act of May 8, 1822; had also been the Florida Delegate in Congress at the date of the passage of the act of 1828, and chiefly instrumental in securing the long-delayed action by Congress upon the Florida land titles. Also, prior to the suit of Percheman, he had been appointed by the President the law agent authorized by the

tenth section of the act of 1828, and, after a visit to Spain, had compiled for the Government a complete collection of all the Spanish ordinances affecting land titles in Florida, which has been published in volume 5, American State Papers, pages 631 et seq. (Gales & Seaton's edition); also 2 White's Recompilacion, page 9 et seq.

No man was better advised regarding the purpose and intent of the act of 1828 than Mr. White. He was probably the author of the law. Vol. 5, Amer. State Papers, p. 351 (G. & S. ed.).

It will be remembered that the United States contended in the district court and on appeal that the court was without jurisdiction, and that the language of the grant by Estrada is, "I do grant him *in absolute property* the two thousand acres."

It will be found from the argument of Mr. White, printed in 7 Peters, that he brought directly before the court the question of jurisdiction under the acts of Congress, and also the power of Congress in the premises.

In this case the board of land commissioners had rejected the claim, and it was contended by the United States that this was a final determination. Mr. White contended that Congress had no power to create a tribunal to finally reject a claim confirmed by treaty *without an appeal to a court*. (7 Peters, p. 80.)

He contended further that this court had jurisdiction by the terms of the statute, which are "all the remaining claims which have been presented according to law and not finally acted upon shall be adjudicated," etc. (Sec. 4, act of May 26, 1830.)

The views of Mr. White as to the court's jurisdiction were sustained (pp. 86 to 95 of the published report, which will be referred to later in this brief); the purpose of the foregoing argument being to more clearly demonstrate the views of Mr. White because of the prominent part borne by him in the passage of the act of May 23, 1828. See Debates in Congress, Benton's Abridgment, vol. 10, p. 183; vol. 11, p. 68. See also Reports of the President to Congress; 2 White's Recompilacion, p. 9, p. 11, last paragraph; 5 Amer. State Papers, p. 631 (G. & S. ed.).

The act was so understood by the bench and bar.

If it had been unnecessary to present complete titles to the court for adjudication and settlement, how can we account for the owners of large grants held by complete title risking their property by a petition to the court for confirmation? Some of the ablest lawyers of the country went to Florida to engage in the lucrative practice created by the land laws; yet we find many cases involving thousands of acres of land held under complete titles presented to the court upon petition for confirmation, with full knowledge that if successful an appeal would be taken by the United States in all, embracing more than a league.

To impute to the contemporary profession a doubt of the necessity of presentation of this class of claims is to charge the most reckless disregard of property interests ever known in history.

Among the many complete or royal titles presented to the court and appealed, a few may be named as follows: Arredondo, 6 Pet., 691; Clark, 8 Pet., 436; Fleming, 8

Pet., 478; Mitchell, 9Pet., 716; Arredondo, 13 Pet., 68; Levy, 13 Pet., 81; Chairs, 10 Pet., 436; Hernandez, 10 Pet., 303; Wiggins, 14 Pet., 334; Buyk, 15 Pet., 216; Broward, 16 Pet., 143; Acosta, 1 How., 29; Delespine, 15 Pet., 226. See also argument of Richard K. Call, counsel for the United States, printed as Appendix No. 1, in Book 8, Lawyers' Cooperative Edition Supreme Court Reports, and also in volume 8, American State Papers, p. 288 (G. and S. ed.).

In the sixth paragraph of his argument, Mr. Call says: "The sixth section of the act of 1828 gives jurisdiction to the superior courts over all claims to land in Florida embraced by the treaty."

Mr. Call was acting governor of the Territory of Florida under General Jackson, and one of its ablest lawyers. From the vigor and force of his opposition to a confirmation of these and other large grants, even to taking issue with this court as to the power vested by law in the governor (see p. 252, vol. 8, American State Papers, G. and S. ed.), it can not be supposed that the interests of the Government would have been so far neglected as to have failed to raise the objection of want of jurisdiction in the court to hear and determine each of these large grants, which Mr. Call contended were of no validity.

From the high character, legal ability, and the positions occupied by both Mr. White and Mr. Call unusual force is given to the rule that in case of uncertainty the contemporaneous construction of a law by those called on to act under the law is entitled to great respect. (*Edwards* v. *Darby*, 12 Wheat., 207–210.)

But there never was any uncertainty in the meaning of the act of 1828. It has been many times construed by this court. With the indulgence of the court, for reasons of convenience in the use of other than the official edition of its reports, counsel will set forth at length citations from a number of cases construing this act.

In the Arredondo Case the court says:

> It was in the discretion of the legislature to select the cases to be submitted. * * * If we shall be of opinion that the title of the claimant was such as might have been perfected into complete title * * * or which were valid under the Spanish Government * * * in the words of the Florida laws * * * we can decree finally on the title. (*United States* v. *Arredondo*, 6 Peters, pp. 719-720.)
>
> The sixth section of the act of 1828 is still more comprehensive. It provides that all claims * * * shall be received and adjudicated by the judge of the superior court of the district. *This includes all claims.* This embraced all not before decided and not finally settled *with only two exceptions*, one as to quantity, the other as to date and forgery. The twelfth section of the Florida act finally bars at law and in equity *all claims* * * * *not brought by* petition before the court. (*United States* v. *Arredondo*, 6 Peters, p. 721.)

The grant to Arredondo was in absolute property and one of the two grants in East Florida made by a person other than the governor.

In the case of *United States* against *Clark* (8 Peters, 436), Chief Justice Marshall, delivering the opinion, says:

> It was obviously the intention of Congress to extend the jurisdiction of the court *to all existing claims* and to have them finally settled. * * * The

> words which confer and describe the cases on which it may be exercised are "all the remaining cases which have been presented according to law and not finally acted on." (*United States* v. *Clark*, 8 Peters, 445.)
>
> The grant which constitutes the foundation of the petitioner's claim is a complete title, subject to no condition whatever, emanating from the governor of East Florida, who was the lawful authority of His Catholic Majesty for making grants and concessions of land in that province. (Ibid., p. 467.)

It is worthy of notice that both the inchoate or first title and the complete title to Clark is printed in the report. Later in this brief the attention of the court will be called to the form of the first decree or grant, and that of the complete title as there exhibited, and a comparison made with the form of the alleged title to Fish.

In the case of *United States* v. *Percheman* (7 Peters, 51) the following is the language of the court:

> The sixth section of this act (1828) transfers to the court *all claims* which shall not be decided and finally settled under the foregoing provisions of this act * * * and declares they shall be received and adjudicated by the judge of the district court. * * * A proviso excepts from the jurisdiction of the court any claim annulled by the treaty * * * or any claim not presented * * * (p. 93). It (jurisdiction) is conferred, if at all, by the act of 26 May, 1830 (p. 86).

In the case of *Mitchel* v. *The United States* (9 Peters, 711) this court says:

> The acts of Congress submit these claims to our adjudication as a court of equity and, as often and

uniformly construed in its repeated decisions, confer the same jurisdiction over imperfect, inchoate, and inceptive titles as legal *and perfect ones*, and require us to decide by the same rules on *all* claims submitted to us, whether *legal* or equitable (p. 733).

That by the treaty with Spain the United States acquired no lands in Florida to which any person had lawfully obtained such a right by a *perfect* or inchoate title, that this court could consider it as property under the second article, or which had according to the stipulations of the eighth article been granted by the lawful authorities of the King (p. 734).

In the case of *United States* v. *Kingsley* (12 Peters, 476), on page 485, this court says:

Arredondo's grant confirmed by this court (6 Peters) was a clear case of a grant in fee. * * *

In *United States* v. *Wiggins* (14 Peters, 334) the court says:

It was adjudged by this court in the cases of Arredondo and Percheman (6 and 7 Peters) that the words "shall be ratified and confirmed," in reference to *perfect titles*, should be construed to mean are ratified and confirmed in the present tense. The object of the court in these cases was to exempt them from the operation of the eighth article, *for the reason that they were perfect titles* by the laws of Spain when the treaty was made. Percheman's had no condition in it, and the only difficulty involved was whether "it had been made by (the) proper authority" (p. 349).

On page 160 of *United States* v. *Meranda* (16 Peters, 153) the court uses this language: "Has uniformly been in contemplation of this court when it has confirmed Florida grants, inchoate or complete."

In *United States* v. *Delespine* (15 Peters, 226), on page 231, the court says: "This is a grant in absolute property;" and in *United States* v. *Fernandez* (10 Peters, 303), on page 305, "that (as to these lands within the Indian boundary) the grant of the governor severed them from the royal domain, so that they became private property, which was not ceded to the United States by the treaty with Spain;" and in the *case of Segui* (p. 306 of same report), "The grant was made by the governor in absolute property. * * * But we can not attach any condition to a grant of absolute property. * * * He (the governor) made the grant absolute."

Many other cases might be cited where the court has clearly disclosed that it recognized it was dealing with a complete title under the treaty, and declared its jurisdiction. But as if to set the matter at rest for all time, in the case of *Glenn* v. *The United States* (13 Howard, 250) Mr. Justice Catron, in delivering the opinion, expressly declared that the act of 1828 embraced complete titles. He says (p. 257):

> Arredondo's Case is relied on. * * * *That proceeding was founded on a perfect title.* * * * *It was brought before the courts according to the sixth section of the act of May 23, 1828,* WHICH EMBRACED PERFECT TITLES *and was only applicable to suits in Florida.*

How, in spite of this array of authorities, the court could for an instant have admitted complainant's contention that the act of 1828 applied only to inchoate titles is difficult to understand.

Counsel for appellees claimed to establish their contention in two ways: First, that the language used by the court in the case of *United States* v. *Wiggins* (14 Peters, 334) shows that complete titles are exempt from all the legislation of Congress relative to land claims in Florida; and, second, that the language of Chief Justice Marshall in *Fremont* v. *United States* (17 Howard, 542) shows that the courts had jurisdiction of incomplete titles only.

Answering this contention, as to the language in the Wiggins Case which is relied on, namely, "That perfect titles made by Spain before the 24th of January, 1818, within the ceded territory are intrinsically valid and exempt from the provisions of the eighth article is the established doctrine of this court, and that they need no sanction from the legislative or judicial departments of this country," we say: Language equally as broad has been used by this court relative to complete title under the Louisiana and California treaties, and yet under both those treaties it has been held that the acts of Congress required presentation and filing of complete titles and imposed a bar for failure.

McDonough v. *Millandon*, 3 How., 693.
United States v. *Powers Heirs*, 11 How., 570, p. 584.
Maguire v. *Tyler*, 8 Wall., 650.
Snyder v. *Sickles*, 98 U. S., 203 (25–98).
United States v. *Pellerin*, 13 How., 10.
Tameling v. *United States*, 93 U. S., 644 (23-1002).
Moore v. *Steinbach*, 127 U. S., 70 (32–55).
Boutiller v. *Dominguez*, 130 U. S., 238 (32–926).

Complete titles to land in all of the territory acquired by this Government have always been recognized, and deemed not to need legislative or judicial sanction.

Upon the second point the language used by Chief Justice Marshall is as follows (17 Howard, p. —, Bk. 15, co-op. ed, p. 244):

> In this respect it (the California act of March 3, 1851) differs from the act of 1824 under which the claims in Louisiana and Florida were decided. The jurisdiction of the court on *these cases* was confined to inchoate equitable titles, which required some act of the Government to vest in the party the legal title or full ownership. If he claimed to have obtained from either of the former Governments a full and perfect title he was left to assert it in the ordinary forms of law upon the documents under which he claimed. The court had no power to sanction or confirm it under the act of 1824 or the subsequent laws extending its provisions.

It is apparent upon reading the following text that the learned Chief Justice was discussing the act of 1824, under which the Louisiana claims were decided, and not the act of 1828, and that the word "Florida" was used with reference only to that provision of the act of 1828 which prescribed that the forms of procedure should be those directed in the act of May 26, 1824.

The language "obtained from either of the former Governments" makes it apparent he had the Louisiana territory in mind.

Chief Justice Marshall delivered the opinion in the *Clarke Case* (8 Peters, 436), and in that case he refers to

the act of 1824, and says: "It has already been stated that the act does not define the jurisdiction conferred on the court of East Florida by the act of 1830, but directs the mode of proceeding and the rules of decision. (*United States* v. *Clarke*, 8 Peters, 467.)

A few paragraphs further on in the Fremont Case the case of Arredondo is referred to as a grant in absolute title.

We are willing to submit the question upon the authorities upon the one side and the other, taking the direct and positive language in the numerous cases cited, especially the unequivocal declaration of Mr. Justice Catron (13 Howard, 257) on the one hand and the inferences from the Wiggins and Fremont cases on the other.

It may not be amiss to observe that Mr. Justice Catron delivered the opinion in the Wiggins Case, as also in the cases of Forbes, Hanson, Lawton, Low, Marvin, Villalobos, Acosta, Broward, and others, several of which were absolute titles, and also the opinion in *McDonough* v. *Millauden* (3 How., 693), in which more clearly than in any other case is stated the principles that complete titles in Louisiana stand recognized by the treaty of 1803 and required no confirmation by this Government (3 How., p. 706). In the Marvin and Lawton cases he declares the titles to be incipient titles, showing clearly that the learned justice did not overlook the fact that both complete and incomplete titles existed and were being adjudicated by the court.

A conclusive answer to the construction put by appellees upon the language of Chief Justice Marshall in the

Fremont Case is the fact that this court has in numerous cases refused to take jurisdiction of complete titles under the act of 1824, while under the act of 1828 very many of the cases determined are declared by the court to be perfect or absolute grants.

United States v. *Rosileus*, 15 How., 34–38.
United States v. *Powers Heirs*, 11 How., 580.

In the case last cited the court says:

> If we had found this to be a legal and perfect title then the rule laid down in the case of Reynes would apply, and compel us to dismiss the petition for want of jurisdiction, because the act of 1824 did not confer on the district courts power to decide on perfect grants.

It hardly seems possible that the able opposing counsel will, in the presence of this court, contend that the court would have retained and exercised jurisdiction in the many cases of absolute titles brought before it under the act of 1828, if, as they contend, not only was jurisdiction not granted by the act, but prohibited by constitutional principles and the enunciations of this court. It has heretofore been recognized that this court was careful not to exercise jurisdiction unless it clearly appeared to have been conferred by the legislative power.

The opinion in the Clarke Case is a plain and unequivocal answer to the strained construction placed on the language of Chief Justice Marshall by appellees.

In that case, delivering the opinion of this court, he says:

> The party who institutes suit (against the United States) must bring his case within the authority of

> some act of Congress, or the court can not exercise jurisdiction over it. * * * Here the counsel for the United States contends * * * that the court of the District had no jurisdiction. (*United States* v. *Clarke*, 8 Peters, 444.)

As before stated, this was a complete title in which the concession and royal title were set forth in the record and are printed at length in the statement of the case, yet the contention of want of jurisdiction made on behalf of the United States was not sustained. The Clarke Case is cited in *United States* v. *Santa Fe* (165 U.S., 714), upon the question of jurisdiction, and the court there briefly expresses the rule, which is elementary, and says, "Where, therefore, a tribunal of limited jurisdiction is created to determine such rights of property, a party seeking relief must present for adjudication a case clearly within the act."

So under the act of 1860 this court denied any jurisdiction of inchoate titles, and declared such cases must be dismissed whatever be their merit.

Scull v. *United States*, 98 U. S., 410 (25–165).

The fact is that the able counsel for the United States in the appeals in the Florida land cases urged the want of jurisdiction on every occasion, but it nowhere appears that any member of the profession contemporaneous with the law ever made it a ground of objection that the act of 1828 did not give the court jurisdiction to adjudicate upon complete titles.

One other contention of appellees was made which may not be omitted from notice.

Counsel for appellees argued that if by the act of 1828 it was the intent of Congress to require complete titles to undergo adjudication before a court, then the act was in contravention to the treaty with Spain and unconstitutional, and counsel cited many authorities upon constitutional law.

There is no constitutional objection to the law. As stated in the *Forbes Case* (15 Pet., 182) all the public domain of Spain was ceded to this Government and the title in fee vested in the United States. From the lands thus acquired was excepted individual property. It thus became the duty of this Government to provide a method for determining to the satisfaction of it, the owner of the vast body of the territory, what portions thereof had become private property. By the terms of the treaty this duty to determine the character of every grant was prescribed, since the United States agreed to maintain the King's grants to the same extent (del mismo modo) they would have been valid if the King had retained dominion. The debates in Congress and contemporary history show that there was a wide difference of opinion as to the method to be adopted, and that the measures provided in the act of 1828 were advisedly taken.

> See Debates in Congress, First Session, Twentieth Congress, Vol. 5, American State Papers, pp. 350-352, 474–477 (G. and S. ed.)

The measure finally agreed upon was eminently fair and needs no defense. It was infinitely more equitable than the act of February 28, 1809, relating to lands in the Mississipi territory. Briefly, it was this, a confirmation of all claims which had been approved by the

commissioners to the extent of 1 league square, the amount which Mr. Gallatin had reported as the limit of the jurisdiction of a Spanish official in Louisiana to grant, with leave to all persons whose interests were adversely affected, either by a rejection on the part of the commissioners or by the limit of area adopted by Congress, to present to a local court their title for adjudication with an appeal to this court; the United States submitting to appear in the court and to be bound by the decree made. By the act of 1827 Congress had submitted that as to all claims of 3,500 acres or less the report of the commissioners should be conclusive.

The nature of the titles issued in Florida made it necessary that the title papers for large grants should be examined in a court and pass judicial scrutiny. It was well known that for many years before the cession, anticipating the transfer of the territory, there had been extraordinary concessions of lands. It was further known from the experience of the titles derived under the Louisiana treaty, that there were not only complete titles, but concessions. Whether these grants had been made under authority of law by the "lawful authorities" (legitimas autoritades) of the King, it devolved upon this Government to ascertain. (*United States* v. *Perchman*, 7 Peters, 89). The political department of this Government has never acknowledged immunity from inquiry into the acts of foreign officials in matters of land titles. (*United States* v. *King*, 3 How., 786.)

On what principle is the power conceded to Congress to require claims recorded for examination by commissioners, and an equal power to require their presentation

to a court for examination of the evidences of title, denied?

The questions necessary to be determined in the inquiry imposed by the treaty upon the United States are well stated by this court in *United States* v. *Fossatt*, 21 How., 446 (16–187). See also *Lavergne* v. *Elkins*, 17 La., 220.

But appellees say that complete titles in Louisiana were not required to be presented to the courts. There was ample reason for such exemption in Louisiana which did not exist as to the province of Florida. The act of May 26, 1824, is framed on wholly different principles from the act of 1828. The act of 1824 is a mere consent on the part of the sovereign to try the issue of title with its subjects. The act begins with the words "it shall be lawful for any person claiming lands * * * which might have been perfected into a complete title * * * to present to the district court his petition." The act of March 27, 1804, for ascertaining and adjusting titles and claims to land in Louisiana was also entirely unlike the Florida acts for ascertaining claims and titles to lands. The fourth section of the Louisiana act explicitly exempted perfect titles from undergoing examination and investigation at the hands of the commissioners of this Government, yet this defect in the law was so apparent that before the admission of Louisiana as a State Congress required their presentation and record, under penalty of being barred as against the United States and its grantees.

Act March 10, 1812; act April 25, 1812.
United States v. *Power's Heirs*, 11 How., 585.

The language of the fourth section of the act of April 25, 1812, is peremptory like the language of the Florida acts and not permissive.

There can be no doubt as to the meaning of the Florida acts, beginning with 1822 and ending with the act of 1830. The language admits of but one construction: "That every person claiming title to lands under any patent, grant, concession, or order of survey * * * shall file" allows no exception of person or title. If the language were not plain the construction given the act by the commissioners would be a conclusive answer to the contention of appellees.

The fifth proposition of the proposed regulations submitted by Alexander Hamilton to his associates on the first board of commissioners was: "Fifth, that the commission determine whether they can inquire into the validity of the circumstances of a grant antecedent to the issuing of the royal title," etc. (Vol. 3, American State Papers, p. 763, G. and S. ed.)

See also letter of W. W. Blair, dated February 21, 1824. Ibid., p. 760.

There can be no question of the construction put on these acts by contemporary authorities. The very title of the memorial of Sarah Fish upon this alleged complete (?) title recognized the power of the board to adjudicate upon her claim. Where Congress, by confirming the reports of commissioners, has sanctioned the rules and principles on which they are founded, it is a legislative affirmance of the construction put by these tribu-

nals on the laws conferring the authority and prescribing the rules by which it shall be exercised. *United States* v. *Arredondo*, 8 Peters, 713 (8–555).

There are many reasons why all titles to lands in Florida were required to be presented to commissioners for record and to the court for adjudication. It would extend this brief too greatly to enter upon a discussion of the reasons, but the history of the times is replete with references to the subject. It is a well-known historical fact that the archives of West Florida were withheld from the United States; that those of East Florida had to be taken by force, and as stated by Alexander Hamilton "it was a subject of public notoriety that records had disappeared, and in one instance a grant of 16,000 acres discovered to have been introduced in place of another for less than as many hundred." See Report of Hamilton to Secretary of the Treasury. (Vol. 3, American State Papers, p. 766, G. and S. ed.)

The language of the California act (March 3, 1851) is less explicit than the Florida act, being general as to persons and titles. Yet in the very case on which appellees based their argument (*Fremont* v. *United States*, 17 How., 542) the learned Chief Justice uses these words: "It will be seen * * * the eighth section embraces not only inchoate or equitable titles but legal titles also, and requires them to undergo examination and be passed upon by the court." See also *Boutelle* v. *Dominguez*, 130 U. S., 238.

But say the appellees: "The Louisiana and California treaties were not self executory; the Florida treaty was." The report of the master, accepted and confirmed by the court, draws this distinction between the Florida treaty and the Louisiana and California treaties, and reports as a matter of law "that where the treaty acts directly it becomes the law of the land." That is a correct enunciation of the rule of law, but its application to the facts in this case does not support the contention of appellees, first, because even if the treaty acted directly as a confirmation of the grant to Fish there was a duty on this Government to determine to what extent such grant would have been valid if Florida had not been transferred from Spain; and second, even if by the terms of the treaty the several grants theretofore made, and alleged to have been made, had been exempted from examination, record, and survey, Congress by later acts directed their record examination and survey.

Congress may modify a treaty by later legislation. The legislation last of date will control, "provided always *the stipulation of the treaty* on the subject *is self-executing.*" In the words of the master, "acts directly."

Whitney v. *Robertson*, 124 U. S., 190 (31–388).
Ely v. *Robertson*, 112 U. S., 580 (28–804).

In the court below, appellees insisted it would be a confiscation of their lands, confirmed by treaty, if the court should construe the act of 1828 as barring this action. A sufficient answer would be that whatever hardship fell upon appellees was due to their own laches; but a further answer is that the court was to try the

cause as made by the bill. The bill rested the title wholly upon the grant by Spain, "ratified and confirmed by the United States by treaty." If the grant was a a complete grant, it received no confirmation by the terms of the treaty. What is confirmation? Confirmation is the conveyance of an estate that one hath in lands to another that hath the possession, whereby a voidable estate is made sure and unavoidable. When the United States extended the benefit of the treaty to not only those in possession of the lands but also to those in possession of title papers, what constitutional objection can be found to the requirement that all title papers should be submitted to judicial scrutiny and the imposition of a bar for failure to submit the evidence of title and possession, and have them established by proper evidence and record? Appellees argue that Congress could not prescribe that a title already vested should be devested by failure to prosecute it in the courts. But who is to determine whether or not any particular part of the territory is held by such a vested title until the title papers have been presented and examined; and why may not Congress require such examination in the courts and prescribe a bar for failure to present the claim within a reasonable time?

THE SECOND ERROR ASSIGNED.

The court erred in overruling the demurrers of the defendants and requiring an answer.

Appellants filed two demurrers to the bill—one for want of jurisdiction and one for want of equity. The

bar of the statute was set up in each and need not be further argued. Of the other grounds of demurrer this court is asked to consider the following:

(1) The bill disclosed that the matters sought to be determined were still pending before the Land Department of the United States. (2) The bill failed to aver that the claim had been recognized by the United States. (3) The bill showed the United States had determined the lands to be public lands, but failed to aver any fraud or mistake of law in such determination. (4) There appeared to have been no survey as a Spanish grant under the land laws. (5) The claim was barred by laches. (6) Want of possession sufficient to maintain suit to remove cloud on title. (7) A grant in excess of a league square, set out in the bill, and no averment that the excess over one league had been confirmed by Congress or the courts, and failure to aver that the lands in controversy were not within the excess over a league square of the alleged grant.

These several grounds of demurrer will be discussed very briefly, and then only lest they be deemed waived, because each ground of demurrer must necessarily be argued upon the evidence submitted.

The bill showed on its face the Land Department still exercising jurisdiction as to a part of the lands, and there was no averment of lack of jurisdiction, save only the conclusion of law that the United States had no title to the lands. Every adverse claimant, from the Duke of Alagon down to these claimants, might make the same

asseveration. Upon the averments of the bill the court had no jurisdiction.

Astcazaran v. *Santa Rita Land Company*, 148 U. S., 83 (37–377).
Knight v. *United Land Association*, 142 U. S., 161 (35–980).
Downs v. *Hubbard*, 123 U. S., 189, p. 213 (31–123).

The bill failed to aver that the claim had been recognized by the United States.

The bill failed to set out a presentation to the land commissioners for record, or a confirmation by Congress or a court. It was grounded upon the bare averment of a grant from Spain, ratified by treaty. The area claimed was greater than Congress had admitted within the power of a subdelegate of the King to grant. It was judicially known that all grants of land in Florida were required to be presented to the surveyor-general for survey, and to be confirmed by commissioners, Congress, or the court.

We contend the averments of the bill were not sufficient to give the court jurisdiction. See paragraph 5 of opinion of Judge Bronson in *Doe, ex dem. Clark*, v. *Braden*, 16 How., 640.

The bill showed the United States had determined the lands to be public lands, but failed to aver any fraud or mistake of law in such determination.

The facts showing that the United States had determined the lands to be public land were the survey and

patents set forth in the averments of the bill, under the statutes making it the duty of the United States and the Land Department to so determine. Upon such facts the bill should have averred a mistake of law, or fraud, to be maintained.

Catholic Bishop v. *Gibbon*, 158 U. S., 168 (39–936).

Shepley v. *Cowan*, 91 U. S., 330 (23–427).

There appeared to have been no survey as a Spanish grant under the land laws.

The bill set up a claim for 7,500 acres of land under a grant of 10,000 acres, being all of Anastasia Island, excepting therefrom the "King's Quarries." The description of the lands claimed set out their boundaries by sections and quarter-sections under the system adopted for public-land surveys, and not as any part of one section, the method adopted for the survey of private claims, thus showing on the face of the bill that the Land Department had determined the Spanish claim without validity.

THE CLAIM WAS BARRED BY LACHES.

The seventh section of the act of February 8, 1827, required the keeper of the archives to furnish the surveyor of public lands of Florida with a description of each claim to land confirmed, and made it the duty of such surveyor to survey such confirmed claims, while the twelfth section required holders of claims exceeding 3,500 acres to furnish the surveyor of public lands with information to enable him to exhibit the lands claimed

upon the township plats, and provided that the lands of claimants complying with these provisions be reserved from sale as public lands.

No averment is made in the bill that the claimants complied with the statutes in any respect, but it does appear that the claim was in excess of 3,500 acres; that the entire claim had been for more than forty years surveyed as public lands, and the bill averred a continuous patenting by the United States from the 18th of September, 1856, to the 8th of April, 1895, in subdivisions according to the public surveys. Surely there was apparent gross laches in failing to comply with the reasonable provisions of the statute.

WANT OF POSSESSION SUFFICIENT TO MAINTAIN SUIT TO REMOVE CLOUD ON TITLE.

The bill did not attempt to set up actual possession to any lands except the Fish homestead and a constructive possession of all else. As to the lands in controversy, it resolves itself to this: Complainants allege it is their land, but the United States have declared it is theirs by the official acts of survey and patent since A. D. 1834. A court of equity has no jurisdiction to settle these adverse rights, being legal and not equitable rights where neither party is in actual occupancy of the lands. *Frost* v. *Spitley*, 121 U. S., 552 (30–1010).

A grant in excess of a league square is set out in the bill, and no averment that the excess over 1 league had been confirmed by Congress or the courts, and a failure to aver that the lands in controversy were not within the excess over a league square of the alleged grant.

This statement of grounds of demurrer needs no extended argument. The court judicially knew that all grants of land in Florida in excess of a league square were refused recognition by the legislative department of this Government, except they had been specially confirmed by act of Congress or the title papers had been examined and the claim adjudicated by a court. Such recognition or confirmation, as the case might be, was a necessary averment.

Further, by an act of Congress all in excess of 1 league square of grants reported favorably by the commissioners and confirmed by Congress was directed to be sold as other public lands, non constat from the averments of the bill that the lands in controversy were not within the excess over 1 league square, the limit recognized by this Government as having validity by force of the grant from the subdelegate of the King of Spain. As to individual rights derived from a foreign government, this court is governed by the determination of the political department of its own Government.

United States v. *Arredondo*, 6 Pet., 718, 719, 735.
Jackson v. *Waters*, 12 John., 365; 4 John., 163.
Bouteller v. *Dominguez*, 130 U. S., 238 (32–926).
Head Right Cases, 112 U. S., 580 (28–803, 804).
Ping v. *United States*, 130 U. S., 581 (32–1068).

Upon the averments of the bill and the law applicable thereto, it was apparent that the court was without jurisdiction and the bill should have been dismissed upon demurrer.

THIRD ERROR ASSIGNED.

The court erred in referring the whole cause, both questions of law and of fact, to the master without the consent of the parties.

The solicitor for the trustees of the Internal Improvement Fund never consented to the appointment of a master with directions to return his opinion upon the law and facts. Whether he has waived his rights or whether such waiver short of a consent that the master should be appointed a referee entered as a rule of court, would give power to the judge to make the order complained of, is submitted upon the record to this court.

The solicitor for the trustees contends that a court of equity has no power to turn over to a master the determination of matters put in issue by the pleadings. This would give all judges power to appoint assistants, and while it would relieve the judges, would destroy the foundation principle on which our judiciary system is based. No more forcible illustration of the evils of such practice could be produced than the case at bar. Many of the questions to be determined were obscured by the long lapse of time since such questions had been before the courts; others involved laws and regulations of a foreign government, others practice in land matters, and the application of our own laws and decisions. The questions of law were numerous, and questions of fact were disputed.

It appears by the record that the master has accompanied his opinion with an extended argument upon the law, so that instead of having only opposing counsel to

contend against, by this method of reference one party has also to contend against the court, for the master represents the court and upon principle has the ear of the judge.

In the case at bar there were many objections to the report and opinion filed by the master, necessarily taken, so that it became impossible to overcome the general impression created in its favor as the opinion of one who had examined into the controverted matters of law.

It was natural that the judge should give weight to the report of the master, and it is quite probable that the condition of the business of the court was such that he felt he was not required to investigate and examine into the matters of law which the master reported upon as examined by him, and in making his ruling upon the master's report that he gave the benefit of any doubts to the party in whose favor the master reported.

Appellants contend a master's duties end with the taking and reporting of the testimony (*Kimberly* v. *Arms*, 129 U. S., 512–513).

FOURTH ERROR ASSIGNED.

The court erred in confirming the report of the master, in this, that the master, in his report of the testimony filed and made a part of his report, admitted evidence over the defendants' objection and refused to admit evidence offered by defendants, as specifically set forth in said assignment.

(*a*) The master admitted over objection Mr. Sanchez's testimony in answer to the question "State the location

of what is known as the quarries, or King's quarries, on Anastasia Island" (p. 250 of the Record). The objection was well taken. If the quarries were any parcel of land segregated from the mass of public lands, or segregated as public lands from the remainder as a Spanish grant, it was by an official approved survey. The bill avers a grant, except what was known at the time of the Spanish grant to Fish as the King's quarries. No attempt was made to show that Mr. Sanchez had any knowledge of the location of what was known in 1795 as the King's quarries, or that there was any such quarry, or were such quarries at that date.

(*b*) The master admitted over objections the copies printed on pages 465 to 471, American State Papers, Vol. 4, Duff Green's Edition. (pp. 125 to 141 of Record.)

The petition of Sarah Fish and the report of the action taken by the board were objected to on the ground that the bill had no averment on which to make such evidence relevant. The bill was drawn to found title on the grant as confirmed by treaty ignoring all statutory requirements of presentation, record, and confirmation. There was nothing in the pleadings on which to found this evidence.

2 Danl. Ch. Pr. (1st ed.), 410–411.
3 Green. Ev. (14th ed.), 355.
Harris v. *Nixon*, 9 Pet., 483.
Crochet v. *Lee*, 7 Wheat., 522.
Nash v. *Towne*, 5 Wall., 689.

As to all else besides the petition and report of the commissioners appellants objected because the publication in the American State Papers were but printed copies of copies the execution of the originals of which were not proved before the board, and no proof was made before the board of the genuineness of any of the papers, and because the originals were the best evidence. See objections, page 111 of Record.

The special attention of the court is called to this objection for the reason that in the practice in Florida it has become the accepted doctrine that the American State Papers are evidence in the sense that everything printed therein is evidence.

Appellants contend that the *reports* made by the board of land commissioners of their action in any case, or of any action had before them, is evidence equal to the original report filed by the board, but that the printed copies of translations, or of original papers filed with the board are not competent evidence of the proper execution and genuineness of such documents, and that such printed copies are not made evidence by their publication in the volumes of State Papers. In this Fish Case it appears that the board did not have the originals before it. (Vol. 4, p. 470, American State Papers, Duff Green ed.)

The doctrine enunciated by this court in *Bryan* v. *Forsyth* (19 How., 334) and *Watkins* v. *Holman* (16 Peters, 25) has been misapplied. In both cases the language of the court has application to the printed reports only and not to copies of documents reported as acted upon. In the case from 16 Peters, on page 56, the court says, "This

publication does not make that evidence which intrinsically is not so."

2 Philips's Evidence, 436–437.
Ratcliff v. *U. S. Ins. Co.*, 7 John, 38–51.
United States v. *Delespine*, 12 Peters, 654–656.
McDonough v. *Millaudon* (La. p), cited in 3 How., 700.

The presentation of these printed copies of copies raises a presumption that the originals would be adverse. After the objections to the competency of the extracts from the American State Papers were overruled, appellants further objected on the following grounds: (1) That on their face they were evidence of an inchoate title; (2) the alleged grant was not made by the lawful authorities of the King of Spain; (4) it was a concession on condition; (5) it appeared not to be in conformity to the practice under Spain as to execution or location and quantity of land; (6) the alleged grant was not accompanied with any survey or segregation from the public domain; (7) being a concession it conveyed no title descendible under Spanish law; (8) it appeared from the proceedings that the petition of Fish had been rejected by the lawful authorities of Spain (p. 112 of Record).

Every one of the grounds of objection was well taken. As every point will have to be argued upon the evidence, discussion of the above-enumerated grounds is postponed until the fifth and sixth assignments of error are argued.

(*c*) The admission of the deeds from Julia R. Furman and Irvine K. Furman, complainants, Exhibits E and F, was objected to on the ground that at the date of said deeds the United States was in the adverse possession of the lands attempted to be conveyed (pp. 243 and 245 of Record).

(*d*) Appellants objected to complainants' Exhibit U, the copies of the original title papers to Fish from the surveyor-general's office. The objections taken were that these title papers were not in rebuttal, but confirmatory of the testimony respecting their character (see p. 221 of Record); that by the evidence before the master and by the customs in force under Spain, of which the court would take judicial notice, it was conclusively proved by their form and their being loose sheets that the documents were but the first title papers, and were, if genuine, no more than a concession needing a survey and confirmation by the governor before they were evidence of title; that they were mutilated in a manner and at places conclusively fatal to their genuineness; that they were without file mark or other evidence to establish their genuine character; that no proof of the execution of the originals had been offered; that the signature of the governor of the province did not appear after the mutilated sheets; that the party offering the documents had proved no power in Morales to make a concession of land, much less a title in fee, and had failed wholly to show that Morales exercised any office under Spain save only by the very papers offered in evidence.

There can be no question that if the papers are genuine they are but the first title papers.

Doe v. *Latimer*, 2 Fla., 71.
Parvis v. *Harmanson*, 4 La. An., 421.
Flertas v. *Mayor et al.*, 1 Martin, N. S., 431.
Lobdell v. *Clark*, 4 A. (La.), 79.

Judge Douglass, who delivered the opinion in the case in 2d Florida referred to, was for many years United States attorney while the Spanish titles were being adjudicated under the act of 1828.

However, the mutilations pointed out rendered the papers inadmissible without proof of their execution, so that as ancient documents they were not admissible without proof of execution.

1 Phillips on Ev., 4 Am. Ed. (Cowan & Hill's Notes), 177, also p. 602.
1 Stark Ev., 532.

The title papers were based upon the presumption that Morales was the subdelegate of the King. If so, this was matter of record, and the papers were not admissible, however ancient, without proof from the records of the authority to execute them.

Jackson v. *Roberts' extrs.*, 11 Wend., 425.
Tolman v. *Emerson*, 4 Pick., 160.
1 Phillips on Ev., 4 Am. Ed. Note, 180.
2 Phillips on Ev., 472.
1 Green Ev., sec. 144.

(*c*) The master improperly rejected the evidence of Dunham, county clerk (p. 191 of record).

Dunham, as clerk of the circuit court, had made and certified copies from a book in his office which purported

to be a minute book of the old county court of Saint Johns County. These certified copies had been rejected on the ground that the county judge, as the successor to the judge of the county court, was the proper custodian of the record. The witness, Dunham, was called and brought the original docket, and testified that it was in the handwriting of one P. B. Dumas, former clerk of the county court, that it contained records of the trials of civil causes in the county court, and also proceedings of the probate court, and that the paper certified by him had been examined, and as a witness he proved them as an examined copy of the original minutes before him in the county court docket, entered as of date July 27, 1841. Appellants contend they proved the docket to be a court record of the former county court of Saint Johns County, and proved the contents of their Exhibit No. 1 as an examined copy. This evidence is argued later in this brief, upon the point that the certified copy was evidence.

(*f*) The master refused to admit in evidence the list of Spanish governors of Florida, and the periods of incumbency, as irrelevant. The master's ruling was based upon the assumption that it did not matter who was governer, that Morales was acting governor; but of that there is no proof outside of the title papers themselves.

(*g*) The law of Spain forbidding the granting of islands to foreigners was rejected as irrevelant. Irrelevant it could not be. Immaterial it may be, as the court will take judicial notice thereof.

(*h*) The testimony of the witness Colee (pp. 199-200 of the record) was ruled out as irrelevant. That testimony was that the public had quarried stone on any part of the island ever since he was a boy, as upon public land. This was evidence upon the very issue before the court, whether these lands had been occupied and claimed as private, or had been treated as public domain.

(*i*) The extracts from the reports of the register and receiver, acting as commissioners (pp. 212 to 214, and 174, 175 of record), were, we contend, material and important evidence, and should have been received by the master, and his finding should have conformed therewith.

(*l*) The master ruled out as irrelevant all the records from the General Land Office pertaining to the title of lands on Anastasia Island, appellants Exhibits 7 to 12, inclusive (pp. 297 to 318 of record). Exhibit No. 12 (pp. 308 to 318 of record) is the proceeding upon the application of appellees had before the Commissioner of the General Land Office, and on appeal by the appellees before the Secretary, for the adjudication of their claim of a Spanish grant to Anastasia Island. The court judicially knows that jurisdiction of the subject-matter was in the Commissioner of the Land Office. The record shows the claimant there by his own petition, and due and proper proceedings had, with an appeal by claimant to the Secretary of the Interior, and, after inquiry into the law and facts, a final decision against the claimant.

Had the decision been otherwise, would appellees have declared the record immaterial to prove title? Appellants contend that under the averments of the bill this record was conclusive of the title to the lands in controversy, but if not conclusive, how can it be held to be irrelevant or immaterial?

As the discussion of this fourth assignment of errors necessarily causes repetition in the argument and citations of counsel, the further consideration thereof may be better postponed until the character of title offered by appellees, as shown by the evidence itself taken in connection with the laws and customs of Spain in force in the province of Florida, is discussed.

FIFTH AND SIXTH ASSIGNMENTS OF ERROR.

The court erred in sustaining the findings and opinions of the master over objections.

The specific objections filed with the court by appellants are set forth on pages 86 to 91 and 91 to 97 of the record, but brevity will be conserved to discuss the errors without reference to the particular objections urged in the court below.

Epitomized, the master found the grant to Fish was a valid, complete, or absolute title to the whole island called Anastasia, except a defined and segregated body of land reserved in the grant.

The facts and the law are so interdependent that it will be well to argue upon the law and facts together.

THE EVIDENCE FOR APPELLEES.

Appellees presented the memorial and copies from vol. 4, American State Papers, page 465 et seq. (Duff Green's ed.). The memorial of Sarah Fish presented to the commissioners appointed by Congress "to try the validity of titles to land in East Florida," sets out that she claims title to the island in front of St. Augustine, running from thence 18 miles south, known by the name of Ste. Anastasia, *supposed to contain 10,000 acres, as belonging to her husband in 1763;* that in 1792 at a sale by the Spanish Governor Quesada, her son Jesse Fish purchased this island; that Quesada, "or his deputy Morales, from the indisposition of Governor Quesada," reserved a *certain part* of the quarry existing on said island for public purposes. "The part so reserved has always been known by the name of the King's quarry, and begins at what is called the King's road to the south, and as far as a *small distance* to the north of the light-house; east and west no farther than *where the quarry ends*, as appears by stakes and (*if not taken away*) were planted at the delivery," "all appearing by the annexed vouchers, delivery of said island, with witness and *Spanish customs*, and receipt from the treasurer for the money."

THE COPIES OF DOCUMENTS IN THE ALLEGED CONCESSION.

The papers are fastened together with thread, and have indorsed thereon, as follows: "Florida, 1794. Jose Fish soliciting from the Government that 10,000 acres of land be granted him, which his father possessed at the plantation called the Orange Grove, which was sold at public

auction." Assuming all to be genuine for the purpose of argument they are as follows: Petition of Fish dated December 2, *1796*, addressed to the governor, and reciting that at the auction of his father's property Fish purchased "the *place* called the Orange Grove" for $1,700; that the land is of no value and the price paid was only for the fruit trees and the wood "on the land belonging to it" (the Orange Grove place); that residents are cutting the wood, and therefore he prays to be declared owner of the lands possessed by his father "*annexed* to the place of the Orange Grove," which he alleges was, "according to the deeds granted in the time of the *British possession*," 10,000 acres, as Leslie and Solaro can testify.

This petition the governor refers to the assessor-general December 15, 1794, and the same day the assessor-general reports that if Fish had asked to prevent trespassing on his lands or to recover their possession according to his title he would render an opinion, but inasmuch as Fish asks to be declared owner of what his father possessed, which was sold at auction by the Government, it is a matter for the governor to determine judicially, the extent of the land purchased, or the right to land as a new settler.

On the same day the governor directs Fish to make proof of the facts on which he bases his right, or his claim to favor.

Thereupon, on *September 22, 1795*, before the notary Zubirazetta, John Leslie testifies that he was one who during the British possession valued the houses and lands of Fish, sr., and among them was the *plantation* named the Orange Grove, which his son now claims; that he

(Fish, sr.) "possessed with *lawful titles* given in the time of the *former Spanish Government*," and had the 10,000 acres, a *little more or less*, and retained it during the British occupancy; that deponent was over twenty-five years. (Que es de mas de veinte y cinco años de edad.)

On *February 10, 1795*, Lorenzo Llanes, before the same notary, testifies that he has always seen Fish, sr., in possession of the Orange Grove, which contained 10,000 acres, more or less, and knew that he possessed it, with lawful titles from the old Spanish Government; that he was *45 years old* (born A. D. 1750.)

On the same day (whether September 22 or February 10 does not appear) Manuel Solano testifies before the same notary that Fish, sr., possessed the plantation called the "Orange Grove" since the time of the old Spaniards until his death, in 1791, and resided there, and from what he had heard of the *survey* and valuation of Fish's property he knows he possessed the 10,000 acres of land at *that plantation;* that he is 46 years old, and at the time of the *old Spaniards* went with José Leon by command of the Government to separate the King's quarries on "said island *in order to grant the remainder of it to Don José Fish*, who solicited it, after it was actually granted to him, after having made such separation." And that two years after the delivery from the British possession deponent, with de la Roque, the engineer, and two workmen, were commissioned by the Government to designate the quarries, which they did, and set up *four stakes* to separate the King's lands on the island, and Fish remained the owner of the remainder as he had been.

On February 12, 1795, the petition of Fish and proof were by the governor referred to the royal collector for opinion. February 27, 1795, the collector reports that at the sale made by the Government of the property of Fish, sr., no account was made of any 10,000 acres of land as annexed to the Orange Grove plantation; that the trees only within the precinct of the grove were sold, and that Fish has a right to nothing more than he bought at the sale; that if the 10,000 acres belonged to Fish, sr., it should be sold for the benefit of his creditors.

That for better (permanency of) proof of the facts in the case the governor should direct that there be attached to the petition and testimony submitted a copy of the inventory and sale of the Orange Grove sold to Fish for $1,605; that if Fish needs lands the governor may grant them to him as a new settler "*according to what his Majesty has commanded* of this particular."

On March 6, 1795, the governor, following the advice of the collector, directs that the testimony indicated (the copy of the inventory valuation and sale of the Orange Grove) be attached to the papers and all returned to the assessor-general's office, that the governor may be advised as to the "*other points*" referred to by the comptroller.

Then follows copies of the inventory, valuation, and sale of the Orange Grove had in 1792.

The essential facts appearing by this copy are, that in regular course of judicial proceedings the estate of José Fish, a deceased British subject, was sold at public auction; that the ninth item in the list, consisting of the improvements at the place called the Orange Grove,

which was admitted to belong to Fish, though there appeared to be no record title known to the Government, were appraised at $2,180, and were sold at auction to Fish for $1,605, the governor, the comptroller, the defender of the estate, and Fish all signing a memorandum of the sale.

This copy of inventory, valuation, and sale is certified to by the notary as of March 12, 1795.

On the 26th day of March, 1795, the assessor-general and the governor signed an order in the premises which is translated on page 468 of vol. 4, American State Papers (Duff Green's edition), at the foot of first and beginning of second column. The translation reads:

> Having been seen, it was passed over to Don José Fish and was thus ordered and decreed by Señor D. Juan Nepomucino de Quesada, brigadier of the infantry of the royal armies, governor, vice royal patron, and subdelegate of the royal domain of St. Augustine, Florida, and its province, for his Majesty, who signed it with the opinion of his honor the assessor-general, March 26, 1795, which I attest.
>
> QUESADA,
> ORTEGA,
> *Licentiate.*
>
> Before me: ZUBIRAZZETTA, *Notary.*

The Spanish reads: Vistos. Traslado a D. José Fish, etc.

Then follows this record, which, in Spanish, reads:

En el mismo dia notifique *el Decreto* que antecedo a D. José Fish doi fee. Zubirazetta Sno. And a similar record of notice to the royal collector.

NOTE.—Appellants contend that here ends all that is genuine of the document; that the order made above by the governor was a final order (decreto) in the case, and a rejection of the petition of Fish, and the original papers were returned to him, "traslado a D. José Fish;" that all the following papers are spurious, and, if not spurious, wholly without authority.

Appellants have placed in the record convincing proofs of the above statements, which will be pointed out to the court.

Continuing with evidence as offered by appellees, we have next in order a new petition by Fish, without date, setting out that he is a new settler in this province; that the above-mentioned documents having been given him, and he being advised of their contents, as also of the matter of the sale at auction of the place of the beautiful orchard (que se me entregaron dhas. diligencias para contextar el traslado que se me confiere de la representacion del Sor. Fiscal, de cuyo contenido enterado y asi mismo de las diligencias subcequenta * * * sacion y remate del mencionado Bergel), he considers that the fiscal is in error when he reported adversely upon the first petition, that Fish is entitled only to the trees and the land on which they stand; that he has produced proof that his father *owned* "El Bergel," the beautiful orchard, for which an expensive price was paid by him, not for *the trees or the land they occupy, but from love of the place where he was born.* Wherefore he prays that a grant of *said island* be made him, and to prove the little value the land he

bought had, and of his intentions, he prays a copy of the written instrument (del escrito) which he presented the notary after the sale, asking for a deed to the land he had bought, which he declares is a part of the proceedings in the case.

On April 17, 1795, the assessor-general, who recites that he is *lieutenant-governor*, directs that the copy be given and the petition and the copy asked be handed to the fiscal. The order recites that it is made by Ortega, because of the illness of the governor.

The copy desired is dated March 22, 1792, and sets out that on the day previous, at the auction of his father's property, there being no one who would bid for the island of the Orange Grove (Ysla del Bergel), that being the place his father lived in his life, he agreed to pay $1,605 *for it*, and he prays to be put in possession of *it* (mandar se le de posesion *de ella*).

Following this copy is a certificate of the notary dated April 20, 1795, that the same is a correct copy taken from proceedings of the sale of the Fish estate, and statement by the notary that the *lands* of the Orange Grove had no bidder at the auction sale.

On May 4, 1795 Yguinez performing the duties of the comptroller "from the illness of the governor" reports that the *possession* which belonged to Fish, sr. was valued, and the trees of the Orange Grove were valued at $2,180, without ascertaining the acres the trees occupied, much less the 10,000 acres as belonging to the estate of Fish, sr. That it is certain that Fish bought at auction only the land and trees "which the said valuation occupy" which was sold to Fish at the auction.

But the fiscal attorney thinks that Fish has proved that the *site called the Orange Grove consisted of 10,000 acres*, and that Fish expected when he bought it that the 10,000 acres which his father enjoyed would be included in the sale, "because separating the land covered by the trees, the remainder is not fit for planting." He concludes "your excellency" may order the boundaries to be marked which correspond to the Orange Grove to the extent of 10,000 acres.

On May 16, 1795, Morales and Ortega approved this last report. On June 13 the proceedings were further referred by Morales and Ortega to the defender of the Fish estate, who reports on the 17th that "your Excellency" may grant to Fish 10,000 acres of land which his father possessed.

Thereupon what purports to be a grant, and what the appellees call an absolute title to 10,000 acres of land purports to be signed by Morales and Ortega.

This recites that from the proof made by Fish it appears that his father had a *possession* from the time of *the old Spaniards* and during British occupancy of the 10,000 acres *at a place* called the Orange Grove (en el sitio nombrado el Verjel) which Fish purchased at auction, that he bid for the land (as well as the trees) and his bid should be so taken, not to prejudice him. The decree then recites his Excellency said he ordered that (1) "whether by the right which the burdensome acquisition of said land gives Fish, which cost him $1,605, which it appears *he paid for the Orange Grove*, (2) or by the right which the ancient possession of his father gives him to the said 10,000 acres of land, or (3) finally in con-

sequence of the petition of Fish that they should be *granted to him as a new settler*, he be *placed in possession* of the said land, which it appears his father possessed, and is already laid off, with the reserve of the quarries, and the remainder which was not granted to his father, and which the King has reserved. * * * and let there be granted to him on the terms above set forth" (y se le concede en los terminos), the notary (Zubirazetta) to mark the boundaries.

> "It was thus decreed and ordered by Señor Don Bartolome Morales, colonel of infantry of the royal armies, commandant of the Third Battalion of Cuba, which garrisons this city of St. Augustine, Fla., and political and military governor (pro tem.) (interino de ella), who signed this with the opinion of his honor the assessor-general, June 19, 1795, which I attest.
>
> (Signed) BARTOLOME MORALES.
> JOSEF DE ORTEGA,
> *Licentiate.*"

There follows as of July 10, 1795, "Proof of boundary and possession: Proceeding to recite that, being at the *plantation* of the Orange Grove, *in the island of St. Anastasia*, (Estando en el plantage nombrado el Bergel *situado en la Ysla* de Santa Anastasia), in conformity to the foregoing decree, Solano, Arribas, and Jorente proceeded to mark the boundaries of 'the land comprised in these proceedings,' passing from *said place* to where the quarries of the King and *individuals* are situated, and passing along the boundaries, went fixing up stakes to point out said boundaries, across the island, and separated *said quarries*, saying that all beside *them* was what *corresponded*

to Don Jose Fish," into which they put Fish in possession, and all signed the writing in testimony thereof save one.

Following is a receipt dated April 19, *1792*, for $1,735, being the amount received from Jose Fish for one lot and "*the plantation called the Bergel* * * * which was purchased by him."

Upon these documents the board of land commissioners report the following decree:

> The board having ascertained the above to be *a valid Spanish grant for 10,000 acres of land*, do therefore recommend it *to Congress for confirmation*.
>
> December 16, 1825.

Appellees also introduced in evidence the report of the land commissioners from page 276 of vol. 4, American State Papers (Duff Green ed.), pages 122–3 of record. Appellees offered evidence of pedigree and to show the possession of *Charles M. Furman, deceased*.

Appellees introduced as a witness to prove the location of what was known as the King's quarries, Mr. Veranceo Sanchez, who testified over objection as follows:

> Question. Do you know the location of what was known as the quarries or King's quarries on said island which were excepted from the said Spanish grant. If so, state particularly as you can the location of the same and your means of knowledge thereof.
>
> Answer. I do. The road leading from the Fish dwelling going east until you come to the crossroad leading north, and continue on a hundred yards or two east, then the same distance north to a pile of

stones, and from there go straight to the light-house, that was known as the King's quarries, extending north and east to the water from this line; that is, the line from the pile of stones to the light-house (p. 250 of record).

C. F. Hopkins, a surveyor, testified that he made a survey of the lands described in the testimony of Mr. Sanchez, and the map of Hopkins's was filed in evidence, with the testimony of the surveyor that he located the lands by commencing at the corner common to sections 16, 17–20, 21, township 7, range 30 east and ran a line to the road, meandering the road to the pile of stones pointed out by Mr. Sanchez, which sections and road are shown on his map. He testifies, "These roads are shown on the map which I have made and are located with reference to the section lines as shown on the map" (p. 115 of record).

Appellees further introduced evidence of the payment of taxes upon certain lands. The receipts for taxes prior to 1860 are without description of any land, except for years 1853 and 1849, which are for 10,000 acres of land without description. The receipt for the taxes of 1889, the only tax paid since A. D. 1860, describe the lands according to the public surveys, and they are assessed to owner unknown (pages 224 to 232 of record).

The foregoing is believed to be a fair résumé of the evidence of appellees.

THE EVIDENCE OF APPELLANTS.

Appellants offered in evidence (p. 151 of record) the published minutes of the Board of Land Commissioners

of date April 21, 1825, showing that the executors of the will of Sarah Fish were substituted for Sarah Fish in proceedings relating to her claims for land in East Florida, volume 4, page 289, American State Papers (Duff Green ed.). The land in controversy and a 500-acre grant are the only lands found in the reports belonging to the estate of Sarah Fish. They offered Exhibit No. 1, a certified copy of the records of the probate court of St. Johns County, Fla., ordering the executors of the will of Sarah Fish to make returns required by law (p. 293 of record; offer made, p. 151 of record); also extracts from American State Papers (miscellaneous) volume 2, pages 876, 877, 881, 883, 887, 888, 889, 895, tending to prove that Anastasia Island was delivered by Spain to the United States as a part of the public domain, and that the United States demanded and received from Spain all the royal orders authorizing grants of land in East Florida with the original records of all grants made in the province, either by the King, the captain-general of Cuba, or the governors, respectively, and the original records of all decisions embracing individual property, and made an inventory of the same (pages 151 to 154, and pages 154 and 155 of the record); also extracts from the American State Papers (vol. 8, Gales & Seaton ed., pp. 247, 249, 251, 254, 261 to 264, 265, 266, 271, 279, 280, 281, 288; pp. 155 to 172 of record), showing that Congress required information as to the grants of land made in Florida while a Spanish province; that such information was furnished by responsible and prominent officials of this Government, specially advised, setting forth the character and extent of the grants made and

the laws existing in said province at various epochs authorizing the several grants, and transmitting as part of such report the testimony as to the customs and practice in land matters formerly existing in Florida when a Spanish province, and a *complete list of all the real or royal or complete titles to lands issued at any time by the Spanish authorities in East Florida*, with the name of the grantee, date of grant, quantity granted, and by what governor the title was issued.

Also (p. 249, vol. 8, A. S. P.), tending to show that private claims were reserved from sale as public lands and delineated on the township plats by direction of the Land Office as early as 1834, when evidence of the existence of such private claims was furnished, even if such claims were unconfirmed, provided they had been in due time and according to law presented to be investigated (p. 156 of record).

Also, a certified copy from the General Land Office of the tract book of township 7, range 30 east. (Ex. No. 2, p. 381 et seq., of record.)

Also, Exhibit No. 3, the President's proclamation of sale of lands on Anastasia Island as public lands, dated March 8, A. D. 1839 (p. 293–294 of record).

Also, Exhibits Nos. 4, 5, and 6, the President's orders, declaring military and light-house reservations on the public lands of Anastasia Island from 1869 to 1893 (pp. 295–296 of record).

Also, Exhibits Nos. 7, 8, 9, 10, 11, and 12, showing the official action had before the Land Department in the matter of the claim of Charles M. Furman for lands on

Anastasia Island (pp. 297 to 308 and 308 to 318 of record).

Exhibits Nos. 13, 14, 15, and 16, showing the concession to Jose Fish, dated April 1, 1793, of 500 acres at Grahams Swamp as a new settler, its consummation into a royal title April 24, 1819, with the proofs on which such complete title was issued, and the recitations therein contained of what was required to obtain a royal title, and the application to the United States for confirmation of said grant (pp. 318 to 324 and 324 to 338 of record).

Exhibit No. 17, certified copy from the archives of the Spanish concession to Lorenzo Rodriguez, dated February 16, 1793, for lands on Anastasia Island (p. 339 of record). See vol. 8, American State Papers, page 264, for evidence of issuance of the royal title, dated January 9, 1805; also vol. 4, pages 61–268; vol. 5, page 420 (Duff Green ed.); vol. 6, page 119 (Gales & Seaton ed.), American State Papers.

Exhibit No. 18, Spanish concession to Francisco Sanchez, of lands in Anastasia Island (p. 341 of record).

Exhibits 19 and 20, copy of published notice to claimants under Spanish grants to present their claims that they may be exempt from sale as public lands (pp. 343 and 344 of record).

Appellants also offered from Clark's Land Laws[1] (pp. 1023 et seq.) extracts tending to prove that British grants were required to be recorded to be of validity

[1] The title of the book is Laws of the United States, resolutions of Congress, etc., respecting public lands. Compiled by order of Congress, dated February 19, 1827. Washington, 1828.

under the treaty of 1783 between Great Britain and Spain, and were forfeited if not so recorded and confirmed by Spain (p. 176 of record).

Also evidence that under the Spanish dominion there existed one office for the issuance and custody of concessions and another office for the issuance and record of complete titles, and the practice to entitle the grantee to a royal title after a concession granted (pp. 171 and 177 of record).

Also from Clark's Land Laws (p. 974) so much of the Royal Regulations of October 15, 1754, as declares the complete title to be in the King's name and its legal effect, and from page 973 the King's direction for compliance with the regulations in grants of land made (p. 180 of record).

Also from Clark's Land Laws (p. 1015) the testimony of Clark of the practice under Spain to procure concessions and titles to land (p. 180 of record).

Also on pages 1013 and 1014 of same book, testimony of Hernandez upon the same customs (p. 181 of record).

Also from Clark's Land Laws, page 994 (see the same in the Report of Commissioners, vol. 3, page 624, American State Papers, D. G. edition), regulations of Governor Quesada, that he would make concessions in the name of the King of lands for settlement, in quantity required, upon petition and proof, but though authorized by the laws of the Indies he would *make no absolute titles*, but would report such cases to the King for confirmation of the concessions made by him (p. 181 of record).

Also from Clark's Land Laws (p. 997), the order of Governor Quesada, dated November 20, 1790, promul-

gating the royal order of 1790, and the limits of the grants to be made thereunder (pp. 181, 182 of record).

Also from volume 3, American State Papers, page 743 (D. G. ed.), the list of Spanish governors from A. D. 1784 to A. D. 1811 (p. 197 of record); and from volume 5, American State Papers (p. 669), so much of the Spanish ordinances as prohibits grants to foreigners of any islands (pp. 197, 198 of record).

Also from volume 5, American State Papers (p. 54, D. G. ed.; p. 403, G. & S. ed.), extract from the report of land commissioners showing the practice in land grants under Spain and defining a royal title (pp. 212, 213, 214 of record).

Also from volume 5, p. 372, Duff Green's edition (vol. 6, p. 55, G. & S. ed.), American State Papers, extracts from report of the register and receiver acting as commissioners, setting out the practice existing in the province of Florida for the granting of lands during Spanish occupancy (p. 214 of record).

Appellants also introduced evidence tending to show that Fish's Island only had been occupied by claimants under Fish, and that Anastasia Island had been treated on all sides as public lands.

John S. Masters, a witness for appellants, 91 years old, had been foreman for the United States for seven years during the construction of the sea wall at St. Augustine from the stone quarries on Anastasia Island.

A. D. Rogero, 85 years old, formerly tax assessor and sheriff of St. Johns County, was also a witness.

Neither of these witnesses had ever heard of the boundaries to the King's quarries or of such quarries (pp. 184

and 188, respectively, of record), and both witnesses testified that Anastasia Island was considered public land (pp. 185 and 188, respectively, of record).

Bruce, Colee, and Van Dyke, witnesses for appellants, had entered homesteads on the lands (pp. 193, 199, and 196 of record).

Vevanceo Sanchez, a witness for appellants, testified that he believed Fish was a Spanish subject because he owned property (p. 206 of record); that he (Mr. Sanchez) had been shown the will of Sarah Fish by the county judge, its custodian; that the will devised these lands; that he considered the will of no effect for want of title in Sarah Fish, and he claimed that his (Mr. Sanchez's) wife and her family inherited by descent at the death of Sarah Fish (pp. 207, 254, and 255 of record); that his son, W. J. Sanchez, has been and is in adverse possession of the Fish homestead (pp. 208–252 of record).

William W. Dewhurst, solicitor for defendants, a witness for appellants, testified that he had examined the original title papers in the claim of Jesse Fish for lands on Anastasia Island in the archives (surveyor-general's office); that the only documents found there relating to this claim was a document numbered No. 17, of bundle F, No. 373, which bundle consisted of 100 loose, unbound documents, numbered from 1 to 100, inclusive, and labeled "Memorials and concessions of land." That document, No. 17, consisted of 22 pages, was entitled "Florida ano de 1794, D. José Fish, solicitando del Govierno, sele concedan los diez mil acres de tierra que poseiia su defunto padre del mismo nombre en el plantage nombrado

el Bergel y remante en publica subasta;" that this document was mutilated by having the left-hand half of the sheet, pages 16 and 19, entirely torn off; that the sheets were fastened together by thread, the water marks of the paper of various designs, those in the middle of the document varying from those at the beginning and end; the dates at variance, the first paper being dated 1796 while the last was dated 1795; that the papers had no file mark and nothing to establish that they were genuine, except the signatures and flourishes, when these should be proved; that from long experience in the investigation of Spanish titles witness knew that it was the practice for the governor to indorse on the left-hand half or third of the last page of the original petition for lands his ruling or order in the premises, like the copies in evidence in the claim of Fish for 500 acres (Exhibit No. 13, pp. 321, 323–325 of record); that in the Florida cases witness had never found a title emanating from Morales except the one in controversy, nor any title issued by any other than the governor in person except one by intendant of Cuba and one by council at Havana; that in the many titles in St. Augustine derived from Fish at the auction sale of his estate, which witness had examined, all purchasers at that sale save Fish, jr., had taken a complete title in the form shown by the deed to Bartolome Sintro (defendant's Exhibit No. 31), the title being in the name of the King, made by the governor with recitation of his authority at length, and words of absolute conveyance and segregation; that the records of the district court for East Florida had been burned, but wit-

ness was satisfied Sarah Fish's heirs never presented this claim for adjudication to the courts (pp. 216 to 219 of record).

Appellants also offered from Vol. 5, American State Papers, page 751 (G. & S. ed.), such parts of the Spanish and French ordinances, compiled by Jos. M. White by order of Congress and now in the State Department, as tended to prove that the title to Don John McQueen in evidence, on pages 168–169 of record, was declared by Spanish authority to be the model of a royal title, with the conditions on which such titles of proprietorship were issued (p. 220 of record).

NOTE.—The title to McQueen is printed on page 280 of Vol. 8, American State Papers, and the same evidence is set out in Vol. 2, pages 280 and 281, White's New Recompilacion. See also pages 272 to 291 of White for a full understanding of this evidence.

In rebuttal the appellees offered a certified copy of the original title papers to Fish from the archives, document No. 17, to which objection was made because—(1) it was not in rebuttal; (2) from the title papers it appeared to be a mere concession, not evidence; (3) the papers were mutilated; (4) the paper title was set forth on loose sheets, without file mark to identify them; and on their face show that a final order of the governor rejected the claim, while the sheets attached after the governor's rejection are not signed by one having authority; (6) the original petition is dated 1796, while final order is dated 1795 (p. 221 of record).

Appellees also offered in rebuttal the witness Frito, who translated the papers. This witness testified that he followed the printed copy in American State Papers, and that he saw no difference in translating the Spanish verb "concede" either grant or concede; that the expressions translated by him "terms above set forth" meant "conditions set forth" (p. 222 of record).

William W. Dewhurst, a witness for defendant, again testified that the title papers to Fish, offered as complainant's Exhibit U, are a copy of the documents testified to as examined by him in the archives (see his testimony, p. 216 of record), and that the copy has been made to conform to the originals—that is, the same words on each page of the copy as on the corresponding page of the original; the same relative position of the signatures; the same blank pages; and the same marks of mutilation by removal of parts of pages (p. 223 of record).

Upon the foregoing evidence the master finds and reports that the United States acquired no title to the lands in controversy, and that the appellees are entitled to the relief prayed in their bill, except as to certain lands which the master reports are within the reservation made in the alleged grant, and certain lands which the master *reports that he is unable to definitely ascertain whether or not they are within the reservation or the grant*, and so excludes from the limits of the grant.

ARGUMENT UPON ERROR ASSIGNED IN SUSTAINING THE FINDINGS AND OPINION OF THE MASTER.

In arguing these, the fifth and sixth assignments of errors, it will conduce to brevity to argue the evidence as

a whole. The specific exceptions to the master's report and opinion are set out in the record on pages 86 to 91 and 91 to 97, and are not waived.

We will consider, first, appellee's evidence of pedigree; second, appellee's evidence of possession; third, appellee's title papers.

PEDIGREE OF APPELLEES.

The bill avers a grant to Jesse Fish, A. D. 1795; death of Jesse, A. D. 1798, intestate, surviving his mother, Sarah Fish; death of Sarah, A. D. 1825, *intestate*, survivor her granddaughter, Rosalie B. Perpall (called in the bill Jessie B. Perpall), who intermarried with Charles M. Furman. Rosalie Perpall Furman died intestate A. D. 1827, "leaving as her only heirs at law her husband, said Charles M. Furman, and one son, Gabriel William Furman;" Gabriel William Furman died in infancy in A. D. 1836, leaving his father surviving, and, as the bill alleges, "his only heir;" Charles M. Furman died A. D. 1872, and appellees claim by devise from said Charles M. Furman.

Have appellees proved title in themselves, as alleged in the bill? Appellants contend that, on the contrary, they have proved title in the descendants of Gabriel William Perpall, the maternal grandfather of the infant Gabriel William Furman.

The law applicable is on page 189, Thompson's Digest of the Statute Law of the State of Florida, section 11 (sec. 11, on p. 361, Duval's Compilation, where the original act appears).

The title of the act is, "An act regulating descents."

SECTION 1. *Be it enacted, etc.*, That whenever any person, having title to real estate of inheritance, shall die intestate as to such estate, it shall descend in parcenery to the male and female kindred in the following course—that is to say * * *

SEC. 11. And where an infant shall die without issue, having title to any real estate of inheritance, derived by gift, devise, or descent from the mother, and there be living at the death of such infant his mother, or any brother or sister of such infant on part of the mother, or the maternal grandfather, or the grandmother of the infant, or any brother or sister of the mother, or any *descendant of any of them*, then such estate shall descend and pass to the maternal kindred without regard to the father, or other paternal kindred living at the death of the infant, saving, however, to such father the right which he may have as tenant by the courtesy in the said estate of inheritance.

SEC. 14. And in the cases before mentioned, where the inheritance is directed to pass to the ascending and collateral kindred of the intestate, if part of such collaterals be of the whole blood to the intestate, and another part of the half blood only, those of the half blood shall inherit only half as much as those of the whole blood, but if all be of the half blood they shall have the whole portions, only giving to the ascendants (if any there be) double portions.

To succeed, appellees must have proved, first, the intestacy of Sarah Fish, and, second, title by descent from the infant Gabriel William Furman.

Appellants contend the evidence is conclusive on both points against the claim of appellees.

Sarah Fish died testate as to this land. The evidence on this point is as follows, namely, the extract from the minutes of the board of land commissioners of date April 21, 1825, vol. 4, p. 289, American State Papers (Duff Green ed.), reading as follows: "On motion, permission was given by the board to the executors of the estate of Sarah Fish, deceased, to amend the memorials in the claims of Sarah Fish" (p. 151 of record), one of the claims was the claim for the land in controversy; also a certified copy from the minutes of the county court for St. John County, Fla., of 27th July, A. D. 1841, naming the executors of the will of Sarah Fish, and ordering them to file their accounts. (Exhibit No. 1, pp. 291 to 293 (293) of record.)

This evidence was objected to as irrelevant, etc., also because the copy from the minutes of the county court purported to be an exemplification of the records of the probate court of St. Johns County, certified to by the clerk of the circuit court, who is not the proper custodian of the records of which the paper purports to be a copy (p. 151 of record). To meet this objection, the original record book was brought into court by the clerk of the circuit court, the handwriting of the clerk and judge of the probate court were proved, and the certified copy of the records was then proved as an examined copy (p. 191 of record).

But the objection was not valid. The record book was shown to be the "County Court Minute Book." Under the constitution of Florida, as it existed A. D.

1841, the county court had jurisdiction of probate matters and also jurisdiction of civil proceedings where the amount in controversy was under $1,000. (Territorial act, February 17, 1833, pp. 273 et seq.; Duval's Compilation acts of Territory of Florida; "Act to establish county courts, and prescribe their jurisdiction," sec. 2–sec. 8.) By section 13 a clerk was provided to keep the records and minutes, and by section 15 the office of the clerk of the county court was the office of original record for deeds, mortgages, wills, etc., required to be recorded. By the constitution of 1845 the civil jurisdiction of the county court was abolished and transferred to the circuit court. (Art. 5, sec. 6, constitution A. D. 1845; sec. 5, chap. 4, Session Laws of Florida, approved July 22, 1845.)

By sections 5 and 8 of the act of July 22, 1845, all causes and all proceedings and papers connected therewith or relating thereto were transferred to the circuit courts.

The witness, Dunham, clerk of the circuit court, testified that the docket produced from his custody contained minutes of civil and probate causes (p. 191 of record). If the docket related to both the civil and probate business of the county courts, and the civil business alone was transferred to the circuit court, how then could there be a separation of the docket and a part retained in one court and a part transferred to another? Appellants contend that the minute book is a record of both courts; of the county court by the act of 1833, and of the circuit court by the act of 1845, and in whosesoever hands it was found, whether the county judge as the custodian of the

county court records, or the clerk of the circuit court as custodian of the circuit court records, either custodian was competent to give certified copies.

All that was required was that the record be found in a place it naturally and reasonably might be expected to be found, though not strictly in the proper custody.

1 Greenl. Ev., sec. 142.
2 Phill., Ev., edition of 1859, pp. 390–421, 439, 443–450, 453.

The evidence was before the master and competent either as a certified copy by a lawful custodian authorized by law to give copies, or an examined copy of a public record, proved by the witness, Dunham.

But the evidence was but cumulative, for appellees had proved the fact of Sarah Fish's testacy by their own witness. Mr. Sanchez testifies that he saw the will of Sarah Fish in the hands of the probate judge of St. Johns County, "in the archives in the clerk's office;" "that the will *devised this land* between her blood relatives in South Carolina and to her daughter, Rosalie Perpall Furman" (pp. 255 and 257 of record); that he did see it in the proper office for such records before the office was burned; that he presumes the will was burned in the fire of 1887 (p. 255 of record); that under the will of Sarah Fish Mr. Furman was put in possession of the homestead (p. 248 of record).

The witness, Dunham, clerk, also testifies that the original papers of the probate office were burned in 1887 (p. 191 of record). Mr. Sanchez verifies his testimony

as to the will by testimony connecting therewith certain proceedings instituted or contemplated by parties claiming thereunder (p. 209 of record).

Mr. Sanchez claimed in hostility to the will and was their own witness, yet he proves not only testacy, but a devise of this property.

Upon proof of Sarah Fish's testacy the presumption is that all her estate was devised. Every testator is presumed not to die intestate as to any part of his estate. The will was in the probate office and it must be presumed to have been duly executed and probated. The burden is on those claiming in hostility to the will to establish want of due execution. After the lapse of seventy years and destruction of the records by fire, every presumption is in favor of the validity of the will to devise all the testator's estate.

1 Jarman on Wills, 220;
Sec. 1810, Revised Stats., Florida;
Williams Extxs., 450 (3 Am. Ed.);
Belton v. *Sumner*, 31 Fla., 139;
19 Am. and Eng. Enc. Law, 181, note 1.
Stevenson v. *Huddleson*, 13 B. Monr. (Ky.), 299.
Gaines v. *New Orleans*, 6 Wall., 642.

But appellants were not required to prove testacy; appellees were required to prove intestacy. The answer denies that Sarah Fish died intestate, and while the answer, being without oath, was not evidence, it put in issue the facts averred by the bill. The bill did not aver testacy generally, and intestacy as to this land for want of proper execution of the will to devise

land, but intestacy generally, "that Sarah Fish died intestate." The allegations of the bill as to the intestacy of Sarah Fish were not only not proved, but appellees proved by their own witness that she died testate as to this land.

TITLE FROM THE INFANT GABRIEL WILLIAM FURMAN.

If appellees could overcome the evidence of testacy of Sarah Fish they are not benefited, for Charles M. Furman did not inherit the title of his wife or son.

By the statutes of Florida and the evidence in this case Gabriel William Perpall, grandfather, and his blood are the lawful heirs of the infant Gabriel William Furman.

The statute of descents in the Territory of Florida was passed August 12, 1822, and the act continued in force until 1829. (*Jones* v. *Dexter*, 8 Fla., 278.)

By the act of 1822, real property descended first to children, if any. The husband had only a right of courtesy in the wife's realty. Hence, on the death of the mother, Rosalie Perpall Furman, her property passed to her infant son, Gabriel William. At the death of the infant Gabriel William Furman, in 1836, by virtue of the act of 1829, regulating descents, his property passed to his mother's kindred, if any were living at the date of the infant's death.

Thomson's Digest Statutes Florida, p. 189; p. [illegible] this brief.
Jones v. *Dexter*, 8 Fla., 276.
Bailey v. *Fudgeon*, 25 Fla., 153.
Gaugler v. *Rogers*, 25 Fla., 853.

Were there any of the maternal kindred of the infant Gabriel William Furman living at his decease, A. D. 1836?

The agreement between Lieutenant Tuttle and Gabriel W. Perpall (Exhibit H, p. 259 of record) is proof that the maternal grandfather, Mr. Perpall, was alive in September, A. D. 1833. Having shown an heir alive in A. D. 1833, within three years from the date of the infant's death, the burden was on appellees to show his death.

But this proof would not avail them, for the evidence of their own witness, Mr. Sanchez, was that his wife was a sister of the mother of the infant and a daughter of the infant's maternal grandfather, and that her son, William J. Sanchez, was still living, born in A. D. 1850 (pp. 248 and 250–252 of record). See also his testimony that he purchased the interest of the children of Perpall, after taking possession of the Fish homestead, about forty-five years ago, A. D. 1850 (pp. 248 and 254 of record).

If William Sanchez, a grandson of Gabriel W. Perpall, was alive in A. D. 1897, it is an absolute impossibility that there could have been no one of the infant's maternal kindred alive in A. D. 1836. Argument is unnecessary.

If Jesse Fish had any title to the lands it passed to the blood of Gabriel W. Perpall, and such is Mr. Sanchez's contention in his evidence (p. 207 of record).

Appellees could not recover without showing positive evidence of the extinction of the branch to whom the law gave the inheritance. 3 Phillips's Evidence, page 597 (4 Am. Ed., A. D. 1859).

Yet the master reported to the court that Sarah Fish died intestate as to all the real estate known as Anastasia Island, and that Charles M. Furman was the heir at law of Rosalie Perpall Furman and the sole heir at law of her son, William G. Furman (p. 58 of record).

APPELLEES' EVIDENCE OF POSSESSION.

The bill avers that Fish was put in possession of his alleged grant in A. D. 1795; that until the present time claimants under Fish have occupied the Fish homestead on said island and cultivated the fields thereon, and used the woodlands for fuel, paid taxes when assessed, and exercised such acts of possession as the property was capable of (p. 273 of record).

These allegations of possession were put in issue by the answer (p. 20 of record).

It will be seen that the bill avers an actual possession of the homestead and a constructive possession of the great body of the lands alleged to have been granted, including the lands in controversy; it avers the defendants not to be in possession, but it does not allege the lands are unoccupied. Upon the demurrer appellees sustained the averments of the bill by reference to section 1500 of Revised Statutes of Florida, but while the case was pending the supreme court of Florida so construed that section (*Hughes* v. *Hanna*, 22 So. Rep., 613) that this contention was abandoned at the hearing, and they are proceeding independently of statute, under the general jurisdiction and practice in equity.

The evidence of appellees shows no actual possession of any lands beyond the Fish homestead, through Mr. Veranceio Sanchez as their agent; and further shows that appellees have been, and still are, disseized of that possession. Mr. Sanchez testifies:

> I claim Sarah Fish had no right to make a devise of the property. All her right was a dower interest for life, and then the property passed to my wife and the Fish heirs. That is my claim. I have claimed that all the time, and claim it now (p. 207 of record).
>
> I claim through my wife, who was an heir of Jesse Fish, sr., and by purchase from the other heirs, Perpall's children, whereby I claim a half interest under the rules of Spanish law (p. 254 of record.)
>
> My son owns the lands sued for by Magruder & Logan (for convenience so designated), identified as embracing the homestead.
>
> Question. Has your son been in continuous possession since he purchased?
>
> Answer. Yes.
>
> Question. Has the possession of your son been under claim of ownership of the land?
>
> Answer. Yes (p. 252 of record).
>
> I gave up possession to him (W. J. Sanchez) subject to any settlement. I still claim an interest in the property under the Fish grant (p. 256 of record).

It will thus be seen that upon the evidence appellees have no actual possession of any part of the lands alleged to have been granted.

Were it otherwise, would the actual possession of the homestead be a constructive possession of the body of

the alleged grant? We contend not, under the rules of law.

The homestead was situated wholly on a small island called Fish's Island. (See coast survey map, appellants' Exhibit 25, appended to the record after p. 380; testimoney of Mr. Sanchez, Harrington, Colee, Rogero, and Masters, pp. 149, 185, 187, 198 and 251, respectively of record.)

Appellees, in their bill, claimed the lands as described by the public surveys, and offered in evidence the township maps of townships 7, 8, and 9, range 30, showing the lands subdivided into 40-acre tracts by the public surveys in A. D. 1834, approved 1852. On behalf of appellants it was shown that Governor Coppinger delivered Anastasia Island to Colonel Butler as a part of the public domain; that the United States had been in actual occupancy of the lands, first, by survey since 1834, and, second, by reservations of parts of the lands from 1869 to 1893, with a claim of ownership of the whole evidenced by the issuance of patents and allowance of entries from A. D. 1856. (See appellants' Exhibit No. 2 appended to the record, and Exhibits 3, 4, 5, and 6, pp. 294, 295, 296 of the record.)

It must be remembered that these lands were a part of the territory purchased by the United States from Spain, and both parties were and are claiming under a common grantor. The sovereign shall be possessed without seizure. (Comyn's Digest Prerogative, vol. 7, p. 78.)

The Florida statute defining and extending a constructive possession was not enacted until A. D. 1872, and

upon the facts in evidence the United States had long before been in the possession of the lands in controversy, claiming as owner. The bill avers constructive possession in the terms of the statute, but this statute does not apply to great bodies of land subdivided into 40-acre tracts.

Jackson v. *Woodruff*, 1 Cowan, 276.
Thompson v. *Burhans*, 61 N. Y., 69.
Monro v. *Merchant*, 28 N. Y., 43.

Constructive possession must be founded upon a written instrument, effectual in itself as to form and execution to effect a conveyance of the premises claimed. We shall show that at most appellees had a mere concession, not effectuating a legal ownership of any lands, but being a mere right to occupy, at the pleasure of the King, and that not made by the officer whom the court has declared to be the lawful authority referred to in the treaty.

Upon the averments of the bill and the evidence adduced, there was no evidences of legal title upon which to found a constructive possession. (*Jackson* v. *Waters*, 12 Johns, 365.)

Even if the appellees' contention that their alleged grant was confirmed by the treaty be sustained, yet this confirmation could not extend beyond the boundaries given in the grant itself, and there is no evidence that the lands in controversy are the premises described in the written instrument under which appellees claim, namely, the alleged grant of 1795. This grant excepted

not only the quarries, but the lands reserved by the King and the remainder which was not granted.

Where is there any proof of the area or bounds of the reserved lands? Mr. Sanchez attempted to locate "what was called the King's quarries." He had no knowledge of what was reserved in 1795, and admitted that his information was derived from reading the American State Papers—that is, the petition of Sarah Fish which attempts to locate the quarries by old roads and stakes set, "if not taken away" in 1824. There is nothing in the title papers themselves to identify the bounds of the grant, absolutely nothing.

> Revised Statutes of Florida, sec. 1290.
> *McDonough* v. *Millaudon*, 3 How., 693 (11–793).
> *United States* v. *King*, 3 How., p. 786 (11–830).

The premises claimed in the bill were certain subdivisions according to certain boundaries established by the United States claiming in hostility to appellees. The exception from the alleged grant admitted to belong to the United States was only identified by reference to these boundaries marked by the public surveys made many years after possession taken by the United States. It was shown by the agreement made with Lieutenant Tuttle, filed by appellees, that in 1836 the boundaries of the lands claimed by the heirs of Fish, were then unknown (p. 259 of record). According to the most favorable contention, the grant was of certain lands delivered on the grounds, marked off by stakes, but not described in the written instrument under which appellees claim. There is no evidence that any segregation of the alleged grant or reservation was ever made

since the transfer to the United States. As against the United States claiming as grantee from the common grantor, there could be no constructive possession, and in case of a private ownership, constructive possession would not exist before a segregation of the lands claimed by each of the grantees from the common grantor. Without the segregation by a survey, a fee simple estate on which to found a constructive possession could not be acquired from the Spanish Government. 4 Ops. Atty. Genl., 683, cited in *Dautrive* v. *United States*, 101 U. S., 700 (25–871).

Upon the evidence the appellees were not in possession of the lands in controversy and were not entitled to maintain their bill, even if they had shown a complete grant.

2 Story, Eq. Jur., sec. 700, note a.
3 Pom., Eq. Jur., sec. 1399, note 4.
Phelps v. *Harris*, 101 U. S., 370 (25—856—7).
Mackall v. *Casilear*, 137 U. S., 556 (34—7).
Frost v. *Spitley*, 121 U. S., 552 (30—1010).
See cases cited in *Dick* v. *Foraker*, 155 U. S., page 414.

Upon these facts and the law the master reports in his findings that "the heirs of Fish * * * have possessed and actually occupied the plantation of the Orange Grove on said island, in actual area a little less than 100 acres, and claimed possession of and title to the whole of said island, with the exception of the lands so reserved," and he enumerates as evidence of possession

the actual occupation of the homestead since 1824, repair of the buildings, fences, and dams about the plantation; in paying taxes "on the whole island of 10,000 acres up to the year 1856, *as long as taxes would be received;*" in paying taxes for the year 1889; in building new buildings, defending suits against the lands of the Orange Grove and adjacent lands, agreeing with the United States as to quarrying stone, protesting against the action of the United States in allowing homestead entries, and against the claim of the United States that said lands were public domain; in getting wood, posts, and fencing from the lands adjacent to the Orange Grove, and in obtaining wood from the beaches; that Fishs Island embraces lots 2, 3, and 6 of section 29, township 7, range 30, and is the place of the Orange Grove, but is not an island in itself (pp. 54 and 55 of record). Admitting the correctness of the findings, there is certainly nothing in the facts as found that extends the actual occupancy beyond Fish's Island. The master finds this is not an island, but appellees' own witnesses, Sanchez and Harrington, say it is (pp. 251 and 149 of record). There is no dispute that it is called an island, whatever it be in fact.

The master finds the Fish heirs paid taxes as long as they would be received. The law requires the owner to return his lands for taxes annually, and it can not be doubted that if these lands were returned as private property the State would accept taxes. The fact is that in this respect also appellees have shown evidence of abandonment, and paid no taxes on the lands from 1856

to 1889, and in 1889 upon the lands assessed to owner unknown.

The master in his opinion argues away the evidence of possession adverse to appellees' claim by the statement that as to these lands possessed under title from the United States, the complainants claim no relief in this suit (p. 75 of record).

This is begging the question of constructive possession by occupancy of a part claiming ownership of the whole. If many parts of the tract in dispute are unoccupied by either of the litigants, but are adversely possessed, all held under a claim of title set up by one of the two parties claiming the land, the question of which party has the constructive possession of the unoccupied parts becomes a question of law, depending on which has the legal title, and is determinable in a court of law.

We do not dispute the rule that seizin follows title, but in case of disputed title claimants can not proceed by bill in equity to determine the question unless in actual possession. As said in the case from 101 U. S., 370, cited above, if defendants' title is merely doubtful, it is more than a cloud, and they are entitled to have it tried at law. Appellants claimed to be in constructive possession of the lands in controversy under title from the United States, after an exercise of the power of decision upon appellees' title by the Land Department. As said in the case from 51 Miss., 789, cited and approved by the court in *Phelps* v. *Harris*, "had the defendants derived their title even from a doubtful exercise of power, that of itself would be sufficient to exclude the complainants' resort to

equity, upon well-settled principles." The bill should have been dismissed at the hearing as not within the equity jurisdiction of the court for want of possession of the lands in controversy by the appellees, complainants in the bill.

APPELLEES' EVIDENCE OF TITLE.

Appellants contend that before any title papers were receivable in evidence it must appear, first, that such title papers were executed by the King of Spain or his lawful authorities; second, that the title papers operated to invest a right of absolute property. In these Spanish grants it must be not a first concession, requiring to be completed by any act of the granting power, but a royal or real title. Unless it appeared by the evidence that the grant was executed by the lawful authorities of the King of Spain and conveyed an absolute right of property, no suit could be maintained against the patents of the United States.

THAT THE TITLE PAPERS MUST BE EXECUTED BY THE LAWFUL AUTHORITIES OF THE KING OF SPAIN.

The master reports that the power to grant lands in East Florida was conferred not upon the governor, but upon the office itself (p. 70 of record). No authority for this assumption is cited, and none could be cited, for it is contrary to all authorities. By the Spanish laws the King was the source and fountain of title to all lands, and lands could only be disposed of by the King or his

duly authorized representative, delegate, or subdelegate. "Lands which were not granted by the Kings, our predecessors, or by ourselves in our name belong to our patrimony and Royal Crown." (Law 14, title 12, Book 4, recompelacion, cited in *United States* v. *Santa Fe*, 165 U. S., 709.)

Lands were vested not in the State, but in the Crown. It was the *peculium* of the King, one of his regalia, to be disposed of by his own officers at his sovereign pleasure.

1 White's Recompelacion, p. 52.
De Armas v. *New Orleans*, 5 La., 132.

In East Florida the governor was the lawful authority referred to in the treaty.

United States v. *Clark*, 8 Pet., 449 (8–1006).
Mitchell v. *United States*, 9 Pet., 735 (9–292).

Lawful authorities in the eighth article and competent authorities in the ratification by the King mean those persons who exercise the granting power by *authority of the Crown*. (*United States* v. *Clark*, 8 Pet., 449.)

The term "lawful authorities" designates the governor as certainly as if he had been expressly named in the eighth article of the treaty. He is the officer who was empowered by his sovereign to make grants of land.

8 Peters, 452.
Menard v. *Massey*, 8 How., 296 (12–1090–91).
Pollard's Heirs v. *Kibbe*, 14 Pet., 398 (10–512).

The governor acted in the grant of lands, in the name and by the authority of the King as his direct representative. (14 Peters, 406 (10–516).) The governor was the King's deputy. (*United States* v. *Acosta* 1 How., 26

(11–34).) The eighth article of the treaty designated the governor as invested with authority to grant lands. (*United States* v. *Wiggins*, 14 Peters, 334 (10–484).)

Lands in East Florida were only granted (1) by the King, (2) by the intendants of Cuba, (3) by the governor. "The royal title is made by the governor * * * and when within the proper power of the governor is as full, perfect, and complete as legal ingenuity could devise." (Vol. 5, American State Papers (G. and S. ed.), p. 404; p. 214 of record.)

When the archives were forcibly taken from the former Escrebano, Entralgo, the commissioners appointed enumerated the records to be taken, naming the original records of all grants made by either His Catholic Majesty, the Captain-General of Cuba, or the governor of the province, respectively (vol. 2, American State Papers (miscellaneous), p. 895; p. 155 of record).

See also page 973, Clark's Land Laws, royal order of 1754; also testimony of Segui, page 178 of record. In answer to the question, "Could anyone have anything to do with the public domain but the governor?" he replies, "No one."

It will be observed that in the title papers offered in evidence where a formal decree is made by Quesada he subscribes himself "viceroyal patron and subdelegate of the royal domain" (p. 130 of record).

The language of the treaty confirms the grants by the King, or by his competent authorities in his name (las concesiones de tierras en las Floridas, hechas por mi ó por las autoridades competentes en mi real nombre).

It has never before been questioned that the power to

grant lands was a personal trust from the King to the individual appointed by him to represent him in the province, and it probably never would have been questioned had any record been found investing with authority the individual purporting to have made the concession in the case at bar.

It is to be noted that while in the Louisiana Territory there were deputy governors there were no such officers in Florida, which was under the intendancy of Cuba. Even in Louisiana the deputy governors could not issue a complete title, but might make the first decree of grant and order of survey *if he was also subdelegate*.

Delassus v. *United States*, 9 Pet., 134.
Chateau's Heirs v. *United States*, 9 Pet., 145.
Carmichael v. *Brisler*, 8 Martin, 727.

THE TITLE PAPERS OF A GRANT MUST BE OF A CHARACTER TO CONVEY AN ABSOLUTE TITLE, BY WHOMEVER EXECUTED, TO BE THE BASIS OF A SUIT AS AGAINST A PATENT FROM THE UNITED STATES.

Burgess v. *Gray*, 16 How., 62 (14–839).
Menard v. *Massey*, 8 How., 306, 307.
De La Croix v. *Chamberlain*, 12 Wheat., 599.
United States v. *King*, 3 How., 787 (11–830).

A grant under the Spanish law meant not a perfect title, but an incipient right, which when surveyed required confirmation by the governor. *United States* v. *Hanson*, 16 Pet., 200 (10–936).

Although the master failed to consider the mass of evidence in the record distinguishing a concession from a

royal title, the difference in form and the customs respecting the several titles have been made too plain for argument by the Spanish records published by authority of Congress.

After the grant of nearly all East Florida by the King of Spain to the Duke of Alagon the latter sent to St. Augustine his agent, Nicholas Garrido, to learn the extent of his estate. On the 13th of September, 1818, Garrido addressed a letter of inquiry to the governor asking to be advised as to the different titles theretofore granted in the province of East Florida. This brief will not be extended by a detail of the letter, as it will be necessary to consult the citations. See volume 2, White's Recompilation, pages 273–291; 5 American State Papers, 750 (G. and S. ed.). On page 280 (White) the governor directs that an attested copy of each class of titles of proprietorship be furnished (a concession and a royal title); on page 282 (White) the royal auditor reports that the form of the title in absolute property is exhibited by the copy of the title to Don John McQueen, and that such as hold a title paper in that form have acquired irrevocably the right of property.

This title to McQueen is printed in volume 8, American State Papers (p. 280), a part of the report of R. K. Call to Congress, and is found on pages 168–169 of the record in this case.

The evidence of the laws existing in the province authorizing grants of land furnished Garrido is confirmed by the report made by Spain at the request of this Government and printed in 2 White's Recompilation (p. 363

et seq.), and, as stated in 15 Peters, 333, was recognized as authority in the Wiggins Case (14 Pet., 351).

In Report No. 3, page 283, volume 4, American State Papers (Duff Green ed.) (the report to which were attached the six cases of which the Fish claim is one), cases Nos. 13 to 18 embraced in the Arredondo grant were omitted from the printed list, but of the other 14 cases of the 20 cases reported as founded on real titles, every one of them but Nos. 10 and 20 has the royal title printed. (Pp. 443 to 465, vol. 4, American State Papers, Duff Green's ed.; pp. 665–695 G. and S. ed.)

In these twelve cases the title papers all conform to the form given in the title to McQueen, and so will every case of a real title found in the archives.

Of the cases before this court, the case of Clark (8 Peters, 436) sets out in full the grant (concession) and the title of property (royal title), pages 440, 441, and the *indices* of a title in form are recognized in this court in *United States* v. *Castaid* (12 How., 440, 441).

But appellants did not rest with this record evidence of the form of a concession and royal title, but introduced cumulative evidence abundantly proving that in East Florida two distinct forms of title papers were issued upon a grant of land: First, a decree of concession, and, second, the real or complete or absolute title; that the originals of these title papers were issued from separate and distinct offices, and there filed, copies being given the grantee; that the decree of concession was a loose paper, but the real title more formal and bound in books and indexed. (See pp. 170, 171, and 177 of record.)

The master reported: "Nowhere is found any set form of language under the Spanish laws or ordinances in force in the province, or even according to the customs and regulations, by which any grant was necessary to be evidenced or lands conveyed. * * * It was sufficient, therefore, to constitute a complete grant * * * that the governor should by his order and decree designate by some *fit* language that certain specified property was given to the person therein named as grantee." (Opinion of master, p. 70 of record.)

The above is utterly at variance with the evidence in the record and the law. The form is given in the grant to McQueen, as before shown.

In the report of the land commissioners, dated January 31, 1826, from volume 4, American State Papers (p. 276 Duff Green's ed.; p. 563 G. and S. ed.), a part of which was offered in evidence by appellees, the distinction between the royal title and the concession is pointed out in these words:

> A royal title is the highest order of title known to any law, usage, or principle in the province of East Florida. Titles of this description were designed to convey the fee simple to the grantee; they were usually made by the acting governors *in the name of the King;* they *recited the grant to be in perpetuity*, and also the specific metes and bounds of the land. * * * This title may be said to correspond in character with that of a patent issued by our Government. Concessions without conditions are understood to differ from royal titles only in this, that most of the latter recite the metes and bounds, whereas the unconditional concession, though definite in quantity and location of the land, is still

subject to a survey, which, when made, *was followed up by maturing the concession* by a royal title. * * * *There is also a peculiarity in the phraseology of a royal title.* In all the grants of this nature the legal right to grant the lands is asserted. (Page 123 of record for the concluding paragraph, the other part being omitted from the evidence.)

Appellants have piled Pelion on Ossa in proof that this Fish grant was but a first concession. The evidence proves the custom to have been, first, a petition for a grant, with a second petition asking for a title in form; second, that when the title in form was issued express words were used. This is the almost invariable form: "Wherefore, agreeably to the sovereign will, I have granted, and in the name of His Majesty, whose royal justice I administer, I do grant ———, the said ——— acres of land in absolute property, and by these presents I deliver him the corresponding title, by which I separate it from the royal domain;" third, that the grant is in the name of the King; fourth, the grant itself declares a segregation from the royal domain. See remarks of Chief Justice Taney in *Fremont* v. *United States*, 17 How., 542 (15-244).

See testimony of Alverez in *Wiggins's Case* (8 American State Papers, 271), that the grant on the memorial was deposited in the archives; that when the governor decreed a royal title the decree was transferred into another office, but if no royal title, the decree remained in the office where first deposited; that to obtain a royal title a *second memorial* and *decree was necessary;* that when a party got a decree for a royal title he took it to the escri-

bano, who drew out the royal title in a book, and the governor signed it; that the royal titles were bound in large books and indexed; that the concessions were not issued from a book, but marked and filed away in the loose sheets in which they were made in bundles; that the title from the King in full property was conveyed only as above stated (pp. 165–166 of record).

From the report of land commissioners dated January 20, 1829 (vol. 5, American State Papers, 372; vol. 6, p. 97, G. and S. ed.), "there were two offices under the Spanish Government, the escribano's, which was regularly kept in books. * * * It seems to have been the place where all grants were recorded when fully matured. The other where the papers were in loose and detached sheets, making it easy to have a forged document thrust among them without the power of detection. This is the office where memorials for lands, with the inchoate decree of the governor, were first thrown, and it does not appear to the board that these first decrees do in any case amount to a grant. * * * Then it was that the documents were all transferred to the office of the escribano, fairly written out in a book of reference and entitled to the fullest confidence; but the loose papers, the first memorials and decrees, * * * do not seem to convey any title, or to have been considered any record (pp. 170, 171 of record). See testimony of Segui, Clark's Land Laws, page 1023; pages 176, 177 of record; testimony Perpall, page 1027, Clark; page 178 of record. See Royal Order, November 20, 1790, Clark's Land Laws, page 997; pages 181–182 of record; Order of Quesada, page 994, Clark; page 181 of record.

At the time the Forbes grant was pending in this court, a claim for 1,000,000 acres, this Government applied to Spain for a list of all grants issued in Florida. This was furnished as to grants in West Florida, and is now in the State Department, and the accompanying papers are printed in 2 White's Recompilation, pages 338–391. On page 341 it will be seen that it was also the custom in West Florida to register the complete title in books. The master says appellant's contention that this distinction existed is mere assumption, unsupported by proof (p. 74 of record); yet the testimony of Alvarez, the old Spanish keeper of the archives, is set out directly to the contrary (p. 165 of the record). See argument of Mr. White in Perchman's Case, (7 Peters, 78). See Report of Register and Receiver (p. 171 of record). "Then it was that the documents were * * * fairly written out in books of record." That the first document in the grant gave but a possessory right, see Governor White's report in Dupont's Case (p. 353 of record).

Although this evidence above referred to was in the record, the master has reported, "The grant was perfect in itself; showed clearly the intention to grant the *lands* absolutely. * * * The master therefore concludes that the grant was a complete grant in form, and not an incipient or inchoate right, which required further action of the Government in order to perfect it" (p. 71 of record).

Upon this finding depended the whole case, and it would seem its importance demanded that it be fortified by evidence of law or custom, or otherwise by the language of the grant.

The answer not only put in issue the title of complainants, but averred that the bill set out only a first concession, and that the grant to Fish was not in the name of the King, etc. (paragraphs 26–30, 31 of the answer, pp. 22 to 24 of record).

Appellees were bound to prove the averment of their bill that the lands were granted by the Government of Spain to Fish—that is, that an absolute right of property existed in Fish at the date of the treaty.

As above stated, they make no proof outside of the words of the alleged grant and its accompanying papers. They first assume these to be genuine, and then making them evidence by this assumption, they assume their effect, and say, "This grant (the paper itself) showed clearly the intention to grant the lands absolutely." We contend the law and evidence demonstrate to the contrary.

Fortunately, in addition to the authorities cited as to the law and custom existing, there is set out in *Clark's Case* (8 Peters, 436) the first decree as well as the complete title in form.

Now, a fair test of whether the opinion of the master is correct, or whether, as contended by appellants upon authority cited, the form of this alleged grant by Morales was, if genuine, that of a concession, is to compare it with the form of both a first decree and also of a complete title.

Take the decree and title in *Clark's Case* (pp. 440 to 443 of 8 Peters). Clarke in his petition prays not for possession, as Fish does, but for "a title of property" to the land which he designates as situate on the western

part of the St. Johns River, above Black Creek, at a place known as White Spring. The petition is dated March 16. On April 3 what is described as a "grant" is made in these words, according to the translation: "It is granted to the aforesaid Don George Clarke the 5 miles square of land that he solicits, of which a title shall be issued," etc. (The title was issued upon application to the secretary of the governor on proof of survey, etc.) (See case of Kingsley, p. 660, G. and S. ed.; p. 440, Duff Green ed.; vol. 4 American State Papers.)

Now observe the form of the title of property. First, it is so entitled upon the document itself, then it recites the authority for the decree, and that a decree of grant has been made and the record thereof in the archives; then it makes the formal title in *the name of the King* in absolute property, declares it to be a competent title, and recites its effect as a complete title, and finally the execution thereof by authority of the sovereign will.

Does the alleged grant to Fish in any respect resemble the real title here set out? Not at all. It is similar to the first concession, only not so clearly a concession of the land, but a mere possessory right.

This matter is of such importance that the court will indulge counsel to further illustrate the character of the alleged title papers by a comparison of the same with a grant declared by this court to be an incomplete concession in the *Marvin Case* (3 How., 620–624). The claim of Judge William Marvin was based upon the grant to Bernado Segui made by Govérnor Estrada on the 20th of December, 1815. The petition prays for a grant in absolute

property of the 7,000 acres at Buffalo Bluff, between Dunns Lake and Horse Landing, and the translation of the governor's order is "let there be granted to him in absolute dominion the 7,000 acres of land which he petitions for under the boundaries which he points out," and on the 10th of September, 1818, the public surveyor certifies that he made a survey and plat of the tract. Vol. 3, American State Papers, pp. 752, 837, and 894 (G. and S. ed.). Yet this grant, in which the language is immeasurably more to be taken as a conveyance of an absolute title than that used in the alleged grant to Fish, is declared by Mr. Justice Catron to be "a concession in the first form."

It is further to be noted that, as with the Fish claim, this grant was recommended to Congress for confirmation, yet Judge Marvin, the successor of Judge Bronson, who, as judge of the district court of Florida, adjudicated the cases under the act of 1828, and one of the ablest jurists connected with the history of Florida, deemed it necessary to bring his claim before the courts under the provisions of the act of Congress, and upon his failure to secure an adjudication of the claim admitted the obligation to present the same under the act of 1860 to the register and receiver under section 2 of the act, and finally to Congress for confirmation, rather than bring the same before the courts as a perfect title under section 11 of the act.

> See act of March 3, 1873, vol. 17, p. 771, Statutes. Land laws, local and temporary, vol. 1, p. 699.

If the form of title used for complete grants of land were exceptional there would be some ground for the

master to report that the grant to Fish was a "complete grant in form;" but, as the authorities cited on page 93 of this brief show, the reports of the land commissioners are filled with copies of titles which are complete grants in form, and all of them correspond with the form on pages 441 and 442, 8 Peters, and do not correspond with the form of the alleged grant to Fish.

There seems never to have been any doubt by the courts as to the form and effect of an inchoate grant in the days when these cases came before them. Beside the case from 2 Florida, page 81 et seq. (p. 91), the Louisiana cases are numerous in which it is laid down in the most explicit terms that a concession and order of survey with a delivery of possession did not convey any title without the issuance of the real title; that the grantee became the owner only after the real title, completed with all the formalities prescribed by law, had been delivered to him.

Purris v. *Harmanson*, 4 La. An., 421.
Flertas v. *Mayor et al.*, 1 Martin, N. S., 431.
Lobdell v. *Clark*, 4 La. An., 99.
Portalba v. *Copland*, 3 La. An., 86.

The averments of the answer that appellees' title was but the first concession (if the papers were genuine) were proved, and appellees made no attempt to overcome the evidence adduced on this point or to explain the absence of the title in form; yet the court was advised that the alleged grant to Fish in evidence was perfect in itself, and conveyed an absolute title to the lands, and this report stands confirmed by the court, which is error as assigned.

The petition of Sarah Fish to the board of land commissioners:

Sarah Fish sets forth a claim of title to the island in front of St. Augustine called Anastasia, running 18 miles south, as the property of her husband in 1763; that in 1792, at a judicial sale, her son acquired it by purchase; that a reservation was made of a certain part of the quarry existing on the island for the stone for repair of the public works by "the Spanish Governor Quesada, or his deputy, Morales, from the indisposition of Governor Quesada;" that the part so reserved has always been known by the name of the King's quarry, "and begins at what is called the King's road, to the south and as far as a small distance to the north of the light-house; east and west no farther than where the quarry ends, as appears by stakes, and if not taken away were planted at the delivery." The proof she alleges is "the annexed vouchers, delivery of the island, and a receipt for the purchase money." (Pp. 125–126 of record; vol. 4, American State Papers, p. 465, Duff Green ed.; p. 697, G. and S. ed.)

It will be seen that this description of the grant has been adopted in the bill of complaint, and this is the grant the bill avers was ratified and confirmed by the United States by treaty.

This petition was filed within less than three years after the change of flags, at St. Augustine, where the archives and witnesses existed. Yet this petition, obscure as it is, contains the only evidence in the whole

record by which to identify any particular lands. From beginning to end of the title papers the island of Anastasia is but twice mentioned—once in the testimony of Solano and once in the proof of boundaries—and in both cases the language indicates it to be a well-known island, and speaks of the place of the Orange Grove as "*in* the island of St. Anastasia." (Pp. 128 and 138, respectively, of record.)

Appellants introduced in evidence the report of Governor Cespedes to the King, dated A. D. *1787* (p. 346 of record), in proof that Anastasia Island had a distinct, well-known name, as also that it was of sufficient importance to be the subject of a report to the King; yet neither Fish, the applicant, nor Morales, nor any other alleged official of the Government makes mention of Anastasia Island in connection with this alleged grant.

This omission to mention the island by name is significant, and confirms appellants' contention that there was but a mere possessory right sought or granted, if the papers are genuine, attached to the ownership by Fish of the Vergel plantation on Fish's Island.

The original petition of Fish sought only a possessory right. This petition is dated December 2, *1796*, and sets forth that at the auction of the property of his father he bought "the place called the Orange Grove" for $1,700, "only for the fruit trees and the wood *which is on the land belonging to it*." Therefore he "prays to be declared the owner of the lands his father possessed annexed to the place of the Orange Grove," which, he says, amounted to 10,000 acres, according to *deeds granted during British occupancy*, as Solano and Leslie can testify.

The prayer of the petition in Spanish is "suplica á V. S. encarecidamente se degne declazarle *dueno* de las tierras," etc. The word dueno does not signify the owner in absolute property. It applies to a right to control, or a limited right. There are certain well-established facts to be noted with reference to this petition to learn what was sought—whether a mere exclusive right to use the land for wood, pasture, etc., or a grant of the fee.

The form of the petition differs from all seeking a grant. Of the great number appearing in the land commissioner's reports, none fail to describe the particular lands desired and to pray that not the possession, but the land, be granted the applicant.

Next, the subject-matter is to be considered. Anastasia Island was the defense of the city of St. Augustine. It commanded two harbors—that of St. Augustine and Matanzas. On it were two fortified places, where the Spaniards kept small garrisons—one at Matanzas and one at the north end of the island. In 1787 Governor Cespedes made this island the subject of a report to the King, describing its forts and quarries and giving its name (p. 346 of record). Within view of the lands were the archives, in which were kept the maps and plats of private grants and every title issued to lands. The governor's residence overlooked the island.

Can any person be so deceived as to believe that Fish was asking a grant of the island of Anastasia and its 18 miles of seacoast and river frontage in absolute property?

The master reports that Fish prayed to be put in possession by "virtue of his father's title and possession, which he claimed in *old Spanish times*, before the English occupation of Florida" (p. 53 of record). There is no evidence that the father of Fish claimed a title. The report of Governor Quesada of the auction sale of Fish's estate says it was not known by what right he occupied the land. (See American State Papers, vol. 4, pp. 728 G. and S. ed., 486 Duff Green ed.; Case No. 6 of Report No. 6, Gabriel W. Perpall, for 640 acres.) Fish says, according to deeds granted in the time of the British possession, the lands annexed to the Orange Grove amounted to 10,000 acres. According to what deeds? If he desired to be declared owner of Anastasia Island except the public lands, why beat about the bush, attempting to make 10,000 acres of land annexed to an orange grove of 540 trees, less than 3 acres? Why not produce the deeds, either those which he mentions or those which the master finds his father claimed title under. It will be found from the records of the land commissioners (vol. 3, p. 774, G. and S. ed., American State Papers) that Sarah Fish, in her first memorial, presented to the board on September 8, 1823, set up title based upon an order of sale made by the governor a receipt for the purchase money and "an instrument purporting to affirm the sale," and the master throughout his report appears to assume that the title papers offered are but a continuation of the proceedings had in the auction sale ordered by Governor Quesada, whereat Fish purchased the place of the Orange Grove.

Appellants contend the record shows neither a sale nor a grant of Anastasia Island and absolutely no evidence that Fish, sr., had been granted the same, as reported by the master. (See p. 71 of record.) The petition of Fish dated March 22, 1792 (p. 134 of record; Am. State Papers, pp. 469 Duff Green ed., 701 G. and S. ed.), admits he bought the island of the Orange Grove (Ysla del Bergel), "the *place* which his father inhabited," and the *said island* being abandoned (y la de hallarse dha. Ysla abandonada), he asked to be put in possession of it. Now if, as shown, Anastasia Island was an island of public notoriety, could it be possible it was the property referred to as "Ysla del Bergel?" Yet the master so finds. Again, if the purchase at auction was the basis of the grant, why were not title papers made by the governor, as in the case of Bartolome Sintra (pp. 362 to 366 of record) and the case of Travers and many others, purchasers at the sale.

Note the closing words of the petition of December 2, 1796. Fish says if his request is not granted he will consider himself at the greatest loss of the part of his purchase. Is this language reconcilable with the theory that he was asking for the magnificent grant of the whole of Anastasia Island, 10,000 acres, as annexed to the place of the Orange Grove, which he says in his petition of March 22, 1792, he had bought? It is in evidence that until A. D. 1816 the largest grant ever confirmed by the Spanish authorities to any individual for any purpose

was for 3,275 acres. (See report to Congress of R. K. Call, pp. 157 and 158 of record. See list of all complete titles ever issued by Spain, in evidence, pp. 159 to 164 of record, printed in vol. 8, American State Papers, p. 261 et seq.)

Yet the master assumes that when Fish says he will consider himself at the loss of the greater part of his purchase if he fails to obtain the grant he prays for, he has reference to an absolute grant three times larger than had ever been made in the province of Florida and of land commanding the defense of all the Spanish possessions in Florida and two harbors and containing 18 miles of seacoast and a like frontage upon a navigable river. Fish's petition, whatever it prayed, was referred to the assessor-general. The report of Ortega declares that the matter is beyond his jurisdiction, but the governor may grant Fish lands as a new settler, and upon proof that his father had a possession he would have a preference. The report is important in one other respect, namely, it appears that the notary, Zubirazetta, had made statements to Ortega as to what Fish bought at the sale, which statements nowhere appear in the record. In fact, this notary, Zubirazetta, appears in evidence throughout the proceedings with great prominence; and in view of that fact, in connection with the mutilation of the papers, it may not be an ungrounded assumption to say that if there had been no Zubirazetta, the title papers and the case would have ended when Governor Quesada made his last order, dated March 26, 1795 (pp. 132, 133 of record).

Fish is allowed by the governor's order of December 15, 1794, to make the proof of his father's possession, and proceeds to make what must be admitted to be a most remarkable record to present to the Sub Delegate of the King of Spain having the control of the public archives of the province, in respect to lands under his very eyes.

The proof: Leslie says he valued the properties of Fish, sr., and among them was the *plantation* called the Orange Grove, and it is known to him he (Fish) had the 10,000 acres of land, which he possessed with *lawful titles given in the time of the former Spanish Government.* It must be upon this testimony the master bases his report that Fish prayed possession by virtue of his father's title in old Spanish times, but this testimony is not only not evidence, but when it is considered that the plantation named the Orange Grove was directly opposite St. Augustine, and that the witness says he valued the lands, houses, and lots of Fish during the English occupancy, followed by the general statement that he knew he had the 10,000 acres of land with titles given by Spain, without giving anything to identify the particular land, the whole proceeding is rendered improbable, especially when it is known that the British titles had to be recorded and recognized by Spain, being forfeited by the treaty between Great Britain and Spain, and when it is further considered that no grants of land are found to have been made prior to 1763 by the Spanish.

Llanes says he saw Fish in possession of the Orange Grove with a little more or less than 10,000 acres, which

he knows he possessed with lawful titles from the old Spanish Government.

Witness was born in 1750, hence was 13 years old when Great Britain took possession. Neither witness makes the least allusion to Anastasia Island, right under their eyes, when they gave their evidence.

Solano, born in 1749—therefore 14 years old when Spain delivered the province to Great Britain—says he went by command of the governor in the time of the old Spaniards to separate the quarries *in order to grant the remainder* to Fish, who solicited it, and after twenty years of British possession, with the Government engineer (in A. D. 1786), he set out four stakes to mark the King's lands, and Fish was the *owner* of the rest. Even this obliging witness does not attempt to make the possessions of Fish, sr., embrace Anastasia Island, only a plantation called the Orange Grove *in* Anastasia Island, at which plantation Fish possessed 10,000 acres of land. Now, let us see what credibility can be attached to the proceedings. We contend that the character of the alleged testimony is such as to prove it spurious.

The ages of the witnesses at the alleged period of the events disprove it; the fact that they should attempt to make out the area by such proof while at that very time there was a public surveyor (Eastlake, appointed by the King, and after him Pedro Marrot, see page 998, Clark's Land Laws); that one year after, Solano says he helped the engineer, de la Roque, lay off the quarries and "set up four stakes to mark out the lands of the King" on said island and "Fish remained owner of the

remainder," we find the Spanish governor, Cespedes, making this island a subject of a special report to the King without a mention of Fish or his alleged possession. (See defendant's Exhibit No. 23, pages 346–347 of record.) Further, as said, no grant of lands by Spain has been found dating prior to the British occupancy.

Exhibit No. 23 is a copy of a paper found in the Spanish archives at Seville and is verified by the witness Abbie M. Brooks as copied by her.

Assuming for the instant that any governor would have submitted to three such witnesses the question of a right in any private person to so large and valuable a part of the public domain when the archives containing a complete record were accessible, yet the very title papers themselves offered in evidence contain earmarks fatal to a belief in their genuine character.

The papers are written upon double sheets of paper, folded, like sheets of letter paper or foolscap, in the middle. The proof of Leslie (p. 468, American State Papers) is page 3 of title papers and covers the front of page 3 and two-thirds of the back of the same sheet—that is, if two sheets of letter paper were used and each page of the second sheet numbered, beginning with page 3, the proof would be on pages 3 and 4. The proof by Llanes follows Leslie's, *on the same* page where Leslie's ends, but the date of Leslie's, the first in sequence, *is September 22, 1795*, while the following, *on the same page*, is February 10, 1795. Of course it might be possible that such an arrangement of the testimony

could be made and just space enough left on page 3 for the subsequent testimony of Leslie, and Llanes's testimony then written, but it is extremely improbable. This is almost conclusive proof that the title papers at most are a copy of parts of certain originals not found in the archives.

On February 12, 1795, that is, seven months before the date of Leslie's testimony, there is what purports to to be an order to refer the petition and proof to the royal collector for report. The improbability of such a reference of such testimony is great, but if the signature of Quesada had been proved this objection would have had no weight, and is not material to the case of appellants, for on February 27, 1795, the collector reports that Fish had no right to any more land than is proved by the inventory to have been sold at the auction. He adds that in order to settle the matter, to make the record permanent, with reference to any rights Fish may claim as a new settler, and also in the interests of his father's creditors, the governor should order to be attached to the petition and testimony a copy from the archives of what was inventoried, valued, and sold to Fish at the auction sale. The controller advises the governor that, under the law, he finds no reason why Fish may not receive a grant of land as a new settler (Y en caso que Don Joseph Fish necesite tierra vea lengat sin perjuicio de tercero no halla el Ministro fiscal reparo alguno en que V. S. se las conceda como nuevo poblador arreglado á lo que S. M. tiene mandado sobre este particulardo.) The

court will observe, and the Spanish is here quoted, that it may observe, that the comptroller limits the governor's power to the King's commands, showing that grants in Florida were regulated by law, and not by the unlimited discretion of the governor.

By a formal order, subscribed as the subdelegate of the King, Quesada directs that the copies of the proceedings had in the matter of the auction of lands of the estate of Fish, senior, be made and attached to the petition of Fish, and the whole referred to the assessor-general, "that he may consult with me as to what is proper in respect to *the other points*" to which the fiscal refers. What other points? Why, there can be but one answer: The right of Fish to a grant of land as a new settler, whether or not he came within the class directed by the King to be favored, and, as we shall show later, whether or not the concession already made to Fish in A. D. 1791, for 500 acres (Exhibits 13, 14, 15, and 16, pp. 319 to 338 of record) did not preclude Fish from a second grant. No unprejudiced mind can doubt the meaning of this order.

In accordance with Quesada's direction, a copy from the archives of the auction proceedings is attached to the petition and proof. These proceedings are important in that they show that Fish paid but two-thirds of the appraised value of the Orange Grove; that the auction occurred January 31, 1792, and that he (Fish) signed with the governor the formal proof of his purchase of the Orange Grove. At the end of the proceedings, of

date April 19, 1792, is the formal receipt for the purchase money (p. 141 of record). After the copies from the archives is a certificate of the notary. Below the notary's certificate the governor and the assessor-general indorse thereon an order dated March 26, 1795.

This order, properly and reasonably construed, settles absolutely the claims of appellees. The order as translated is, "Having been seen it was passed over to Don José Fish" (pp. 132 and 133 of record).

The Spanish is Vistos; Traslado a D. José Fish. The Spanish word traslado has a special signification with reference to legal proceedings. It will be observed this is a final order, signed in solemn form by both the governor and the assessor-general, with full and detailed recitation, notified to the collector; and, as the notary's certificate declares, the foregoing *decree* was made known to Fish. In the title papers it ends double-sheet 6, on the back of page 12.

Appellants aver and maintain, first, that with this order ends all that is genuine of proceedings by any authorized Spanish official; second, that the decree was a final rejection of Fish's claim to be declared owner of 10,000 acres as annexed to the Orange Grove; third, that it was the conclusion of any claim or proceedings based upon the sale to Fish, the payment or receipt of purchase money, and any right by virtue of the possession of his father, and the papers were returned to Fish. (See remarks of Chief Justice Taney in Fremont case, 17 How., 542, as to concessions not being recalled, and see report of Land Commissioners, p. 171 of record.) Appellees and the

master simply ignore this decree and the contention of appellants, and intermingle all the proceedings, or rather they ignore the next petition of Fish to be granted lands as a new settler, and base all subsequent proceedings upon, and make them a continuation of his first petition; and they assume authority in Morales to revoke the commands made by Quesada upon the claim. No consideration is given by the master to the fact that with this decree ends Quesada's connection with the proceedings, and the fact that the governor's signature fails to appear upon any subsequent paper is accounted for by the master by the following findings of fact:

"The master finds as matter of mixed law and fact that Don Juan Nepomuseno Quesada was Spanish governor of East Florida from the year 1792 to *1795* (??); that from the *16th day of May, 1795, up to and including the 17th day of June, 1795, Bartolome Morales was the political and military governor* of the province of East Florida pro tem., then under the dominion of Spain, invested with full power as such to discharge and exercise all the duties and powers of said office, and so held and recognized by all the officials of the province (p. 59 of record); and in his opinion he goes yet further and reports: "At this time (the date of the final decree of March 26, 1795) it is evident that the governor became ill, *so as to be unable to discharge the duties of his office*" !!! (p. 69 of record). After diligent search, counsel for appellants has been unable to find in the record any evidence to sustain these findings of fact by the master, and respectfully submits that his exceptions thereto should have been sustained.

After the decree of March 26, 1795, when, as we contend, by the custom prevailing, *the original papers, with attached copies, had been returned to Fish*, Fish files a petition as *a new settler*, praying a grant of "the said island." This petition has no date—a suspicious circumstance when it is seen that it begins a new leaf of the papers (p. 13) and the governor's name never again appears in the proceedings.

Appellants contend, first, that the grant was asked to be made to him as a new settler; that is, in conformity to the laws and regulations for grants of lands to new settlers; and, second, that the grant prayed for was a possessory right for use for wood and pasture, and not in absolute property.

The form of the petition sustains appellant's contention. It will be observed that it contains no mention of Anastasia Island; that it sets up his father's possession of the grove, saying that the fiscal limits him to the space of the Orange Grove which he purchased, from which the revenue is not sufficient for his support.

In considering the petition the court should not lose sight of a fact ignored by the master, that there existed at the time, in the province of Florida, laws and regulations governing the granting of lands to new settlers, the cardinal features of which were that lands might be granted for settlement to those persons entitled thereto under the law and in certain limited and defined quantities; that all grants carried with them a condition that the settler would at the end of ten years make the required proof of cultivation, his head rights, etc., and that the first grant was a mere concession, not conveying

other than a possessory right, and of no validity as a conveyance of title until consummated by a title in form. "It does not convey a true title to the property" (p. 353 of record). That such was the law is proved by the authorities cited on pages 92–95 of this brief, and also the Exhibits Nos. 13 to 15. See pages 337, 338 of record, and Exhibit No. 24, report of Governor White to the King (pp. 353, 354 of record).

See report of register and receiver (p. 171 of record), where they say "the first decree in no case amounted to a grant, but gave applicant a bare right to settle. This is no record and conveys no title" (testimony of Clark, p. 180 of record; testimony of Alvarez in Wiggins Case, p. 165 of record). "To obtain a royal title, a second memorial and decree was necessary."

Such portions of this evidence, of which he should have taken judicial notice which established custom and law, that he did not reject as irrelevant and immaterial, the master seems to have overlooked.

But even this second petition, if the papers be proved to be genuine, was rejected, and the comptroller says the fiscal was right and that Fish bought nothing but the Orange Grove. He says "the reason of the fiscal attorney in his opinion of February 27 last is well founded, in considering Joseph Fish as owner only of the land and trees which the said valuation occupy, which is what was lawfully sold at auction." What would destroy all belief in the genuineness of the papers, if we should hold with the master that a title in absolute property was prayed for

and was under consideration, are the recitations of fact in this alleged report. It is beyond belief that one of the chief officials of the King of Spain should, over his signature in an official report to become part of the archives, declare his belief that by the proof in this record Fish had proved "that the site named the Orange Grove consisted of 10,000 acres," and that Fish when he bought the grove believed that 10,000 acres of land would be included in the sale, "because separating the land occupied by the fruit trees (10 acres at most), the remainder is not fit for planting," and that he should advise the governor that for the reason given above the governor might order that the boundaries of Orange Grove to the extent of 10,000 acres of land might be marked off.

Why, the bill declares that the whole of Anastasia Island contains but 7,500 acres of land (p. 1 of record), and, as before stated, Pedro Marrot was living in sight of the lands, "appointed by the Government, with the assent of the council of ministers, to proceed to survey and lay off the lands, which is to be executed by order of His Majesty" (p. 998, Clark's Land Laws), and this Marrot had by public order of October 24, 1791, made regulations for the survey and record of grants of land made.

It is further to be considered that in 1791 Governor Quesada publicly declared that Fish had left the province of Florida, and that under the law he could not inherit the property left by his father. (See title of Bartolome Sintra, p. 365 of record; deed to Travers, 4 American State Papers, p. 486, Duff Green ed.; p. 728, G. & S. ed.) Quesada says Fish, sr., was an Englishman, and

his wife is shown by the testimony of Ann Furman (Ex. B, p. 235 of record) to have been of American birth.

But if we are credulous enough to assume these proceedings to be genuine, and that Fish sought a grant of Anastasia Island which he had up to this time strictly refrained from asking, yet appellees' contention of a grant of title is not aided, for the Comptroller merely advises that he bought nothing but the grove, but that the bounds may be marked to the extent of 10,000 acres. Even after a decree directing the marking of bounds, and admitting Morales had power to make such a decree, it would have been necessary upon the report of the officers marking the bounds to have made a further decree segregating the lands and investing an absolute title. See the proceedings set out in the case of *United States* v. *Peralta*, 19 How., 343 (15–679).

Before he would have had any title that would pass by descent he must have obtained from the office of the Escribano a royal title in the name of His Majesty, or as the ratification of the treaty expresses it, a title "made by me or by the competent authorities in my royal name."

> Report of Saveedra to Garrido, p. 220 of record.
>
> Report of Register and Receiver to Congress, p. 171 of record.
>
> Exhibit No. 24, report of Governor White to the King, p. 353 of record.
>
> Exhibit No. 15, report of notary, claim of Jesse Fish for 500 acres, p. 337 of record.

But appellees have more serious difficulties to remove the suspicion that attaches to the title papers at this stage

of the case. This alleged report of Yguinez, dated May 4, 1795, in the title papers, according to the copies from the surveyor-general's office (Exhibit U, pp. 287–288 of record) begins on page 16 of those title papers, as the same are paged in the copy. The originals show that from pages 1 to 15, each leaf has been marked in regular sequence, the front of the leaf being numbered and the back of each leaf being not numbered, that is, what would be page 3 of this brief is page 2, and what is page 2 of this brief is blank, or in other words taking a sheet of foolscap paper, the first page of the sheet would be marked 1 and the second half of the sheet, or its 3d page, would be marked 2. The certificate of Zubarrizetta, dated April 20, 1795 (p. 469 of Duff Green's ed., and page 701 of Gale & Seaton's ed., American State Papers; p. 287 of record), ends on the reverse side of page 15 of the document, what should be page 16 is found to be a blank page, with the left half torn off, the sheet is severed in the middle, and the next paper attached is numbered page 16. It is in evidence, and the custom is so universal that to be otherwise is the exception, that it was the rule in matters presented by petition to the governor, that his indorsement was made upon the left-hand side of the last or blank page of the original paper, covering from one-third to one-half the sheet. This was the case with the petition of Fish (Exhibit No. 13), the concessions to Rodriguez and Sanchez (Exhibits Nos. 17 and 18). (See report of district attorney for Arkansas Territory; vol. 6 American State Papers, p. 130, G. & S. ed.)

Appellants contend that this mutilation, coming, as it does, after this second petition of Fish, in which he recites

that the proceedings theretofore had had been delivered to him (que se me entregarron dhas. diligencias para contestar el traslado que se me confiere de la representacion del Sor. Fiscal), is evidence that an unfavorable indorsement had been made upon the original papers, and that such mutilation was fatal without explanation.

How is this evidence of mutilation met by the master? This is his report:

> As to the copies from the surveyor-general's office, it was objected that such copies and the originals on file * * * showed that they were mutilated, the half sheets being torn off in many places; that some of the papers bore date subsequent to the date of the decree of grant. Testimony by the defendant was also introduced, as tending to show the customs and regulations of Spain in regard to the form in which the orders were made in such proceedings, and that the watermarks in the original papers were not all alike, but the testimony of the defendants failed at best * * * to cast more than a suspicion of *immaterial irregularities*, and fell far short of overcoming the presumption of validity and genuineness that attaches to such documents produced from the public archives of the country, properly *verified by the keeper thereof*, and the authentic compilation of the same in the American State Papers (p. 66 of record.)

Again he reports:

> The proceedings *bear on their face every stamp of genuineness;* the *testimony* shows they were known and officially participated in by all the members of the governor's official household." (P. 74 of record.)

What testimony? Not one of the papers was required to be proved, and their genuine character is based wholly on assumptions.

Was there a presumption of authenticity; and if so, was it not rebutted? First, as to the copies printed in American State Papers, as before stated, there is no evidence that the land commissioners ever saw the originals. The certificate of the secretary of the board is that "the foregoing is a correct translation of a document on file in the archives." The documents produced have no file mark. The proceedings of the board may be searched in vain for evidence of proof of execution of a single one of these papers, and yet there must have been many witnesses living in St. Augustine familiar with the signatures of many of the officials, purporting to be affixed to the several papers, and possessing information of the watermarks to be found in the paper used at any given date.

Further, it was a suspicious circumstance that this claim had been presented to the board appointed by Congress to investigate, or, as set forth in Sarah Fish's petition, "to try the validity of land titles," and had secured a favorable report, yet the claimants alone of all cases coming to the knowledge of counsel refrained from submitting their title papers to the scrutiny of the court, as required by the very law which gave validity to the action taken in their case by the board before which they had appeared. It will be found from an examination of the reports of cases adjudicated under the act of 1828 that the court required proof of the execution of the grants presented.

Unless the title papers in the case at bar are admissible as ancient documents, proof of the execution of the alleged grant should have been required. (*De la Croix* v. *Chamberlin*, 12 Wheat., 599–603.)

The mere presence among the archives, without file mark, can not be considered, for the reason set out in report of the board of land commissioners, No. 3, of January 20, 1829 (vol. 6, American State Papers, p. 97, G. and S. ed.), where it is said "it is a matter of history that the papers now deposited there (in the archives) were most loosely kept and guarded, and it was a matter of equal facility to take a paper out or smuggle it in" (p. 170 of record); also the report of Alexander Hamilton, before cited, that a grant for a small area was withdrawn and a grant for a large area smuggled in in its place. (See also report of General Jackson, p. 901, vol. 2, American State Papers, "Miscellaneous.")

Mr. Greenleaf says, "an ancient deed * * * having nothing suspicious about it is presumed to be genuine without express proof. (1 Green. Ev., sec. 144.) In Phillips on Evidence (4 Am. ed., A. D. 1859, vol. 2, p. 481 of the text) the rule as to the admission of documents in evidence, without proof of the execution, is qualified by declaring that they must be free from the suspicion of dishonesty, and in note No. 430 (Cowan & Hill) the editors say, "Peake advances the doctrine thus: A deed of over thirty years' standing requires no further proof of its execution than the bare production, provided * * * there is no apparent erasure," etc. * * * In these cases

(where on its face erased or interlined) it will be incumbent on the party to give the ordinary evidence of the execution of his deed, for the presumption from the antiquity of the deed is destroyed by the opposite presumption * * * that some unfair alteration has been made in the deed," and the editors sum up their conclusions as follows: "Strictly speaking, we apprehend no instrument however ancient can be said to prove itself. All that we understand from the rule on this subject is that when an instrument appearing on its face to be thirty years old is produced its authenticity may in certain cases be presumed, not from anything belonging solely to the instrument itself, but mainly from circumstances out of it, the existence of which like other facts *must be shown on the trial.*" (Phillips on Evidence, 4 Am. ed., p. 476.)

And further, "It is agreed by all cases that where the alteration appears to be suspicious and is not duly noted, as if *the paper has been cut*, or a mutilated figure left, or the ink differ, or the handwriting be that of a holder interested in the alteration, etc., *the onus is on the party* who claims that the alteration was genuine." (1 Phillips on Evidence, 4 Am. ed., note 177, and pp. 602 to 607.) Erasures or interlineations raise a presumption of fraud which overcomes the presumption of genuineness arising from antiquity. (*Ridgley* v. *Johnson*, 11 Barb., 540.)

Not only was there such a mutilation of page 16 of the papers preceding this report of Yguinez, but immediately following the report, immediately after the order of Morales dated June 13, 1875, "To decree more fully

let notice be given to the defender of the estate of Don José Fish, and have the proceedings returned" (p. 469, Duff Green ed.; p. 702, G. and S. ed., American State Papers), and page 18 of the title papers, the left half of the sheet had been torn off, and there was the same break in the numbering of the sheets. Appellants contend the maxim *omnia præsumuntur contra spoliatorem* applies here, yet the master says these alterations, together with the other variances, cast no more than a suspicion of immaterial irregularities, and that the papers are evidence without proof of execution or showing any facts whatever.

Appellants contended before the master and now insist that before the alleged title papers could be received in evidence without proof of execution there must exist these five prerequisites: First, the documents must appear upon their face to be regular; second, they should be proved to be thirty years old; third, they should be proved to come from the proper custody; fourth, the circumstances connected therewith should be such as rendered the existence of such a grant probable; fifth, possession, according to the description in the grant. Appellants contend that the form of the documents and also the circumstances connected with the alleged grant rendered it necessary to make proof of the alleged title papers.

The grants to Rodriguez and Sanchez were conclusive evidence that the possession according to the grant had not been had.

Jackson v. *Blansham*, 3 John. Rep., 298.
Jackson v. *Brooks*, 8 Wend., 431.

The next document in the list of papers, the report of Espinosa, the defender of the Fish estate, is important in one particular. He recites that the "well-founded exposition" of Yginez is in folio 47. Now, in these title papers—and no other papers have been produced or found—Yginez's exposition runs from folio 16 to folio 18, and hence it is apparent that the whole thing is, as appellants contend, a patched-up proceeding, containing possibly some originals, with copies and spurious documents where convenient.

How else can this statement of Espinosa be explained? Of course, if every discrepancy pointed out is "a mere immaterial irregularity," then the objection is of no weight.

We have finally reached the kernel of the nut to be cracked—the order of Morales. This order is dated June 19, 1795, a day when, as the master finds, Governor Quesada was so ill "as to be unable to discharge the duties of his office." The paper begins by declaring that Fish had proved that his father possessed in the time of the old Spaniards the 10,000 acres of land "the *possession* of which he claims at the *place* called the Orange Grove" (en el sitio nombrado El Verjel). Now, we are asked to believe that the "political and military governor of the province of Florida, invested with all the powers and duties of such office," located in the capital of the province, with the records at his command, and in communication with Havana and Spain, declared that the (former) British subject Fish had proved to his satisfaction a right as against the King to Anastasia Island by proof of possession of a *place* called the Beautiful Or-

chard, made by three persons holding no official position, and that such possession had been since the time of the old Spaniards. Did he not know that no grants of land were made in the time of the old Spaniards? The surveyor-general, Pedro Marrott, and his book "that is to serve the Government as a record of the lands vacant," is not needed in this affair.

That Fish, sr., had possessed this important island prior to 1763 and since 1784, and that the governor of the province, who looked upon it every day of his life and received daily reports from two garrisons stationed on it, is informed of the fact only by proof of one witness, who can not write his name, and two others not shown to occupy or have occupied any official position in the province, is preposterous. It must be remembered that this city (St. Augustine) was a military fortress, and every application for lands or for the privilege of building on and cultivating the lands of the Crown, likely to be of military importance, was referred to the chief engineer for his opinion on the influence which the permission applied for might have on the defenses of the city. (Report Land Commissioners, vol. 5, American State Papers, p. 428, G. and S. ed. See Grant to Sanchez, Defendant's Exhibit No. 18, p. 341 of record.)

Passing this with the consideration such a recitation deserves, and proceeding with the papers, his excellency (Morales) said:

> * * * he ordered in consequence that—
> First, whether by right of paying $1,605 for the orange grove, or, second, by right of his father's

possession, or, third, in consequence of Fish's petition to be granted land as a new settler,

"That he be *placed in possession of the said land*."

What land? That his father "possessed and is already laid off, *with* the reserve of the quarries, and the remainder which was not *granted* to his said father, and which the King has reserved."

Stopping here, what do we have? First, it must be admitted that so far there is no grant of title; at most an order that Fish be given a possessory right to 10,000 acres which his father possessed in British and old Spanish times—that is, from before 1763; and second, that from this there was a reservation of, first, the quarries, and, second, what was not granted Fish, sr., "and which the King has reserved."

Now, eliminating Sarah Fish's petition from the record, is it possible to determine the lands granted? By the rule as laid down in 3 Howard, 693 and 787, before cited, that upon a complete title recognized by the treaty this recognition extended only to the boundaries the grants themselves furnished, what lands were granted? What bounds did the grant itself furnish?

But, say the appellees, the delivery of possession is a constituent part of the grant. To this we reply that there is no evidence that any law or custom existed in East Florida for a transfer of title by concession and delivery of possession, and if such did exist they can derive no benefit from the bounds set out in the paper entitled "Proof of boundary and possession," for the bounds

there given are more indefinite than in the alleged grant. The utmost that can be made out from this paper is that going from the plantation (place) of the Orange Grove *in* Anastasia Island to where the quarries of the King *and individuals* were, the notary and party went fixing up stakes and separated the quarries. It nowhere appears what quarries, or how many, or whose quarries, and, as before said, there is absolutely nothing in the title papers to identify the lands granted or reserved, and no confirmation by the governor of the alleged delivery of possession, if the lands delivered could now be identified.

Yet the bill, in seeking to conform to the reservation described by Sarah Fish in her petition, which their witness, Mr. Sanchez, attempts to identify on the ground, has failed to conform to the description of the reservation made in the alleged grant by Morales. The reservation described by Morales is "of the quarries," and "the remainder which the King has reserved," while Sarah Fish claims all the quarries, except part of one, which part she describes as beginning at a certain road. Appellees locate, by Mr. Sanchez, this road, and then say they have established the boundaries of the reservation, and all else was granted to Fish; and the master reports that "it is in evidence that the reservation was properly marked off at the time of making the grant, but that the boundaries of the reservation have been since destroyed, so *there may be some difficulty at the present day* of ascertaining them" (p. 72 of record); also that the "reservation was at the time distinctly marked

off" (p. 71 of record). Can there be a greater confusion of reasoning? We are seeking to identify the boundaries of a reservation made in general terms by a designation made upon the grounds. This designation on the grounds says in terms, "We separated 'the reservation' from the remainder," and yet it is pretended that this is a laying off and segregation of particular lands, and the master reports, "It is simply a question of reestablishment of the boundaries" (p. 72 of record). Only this and nothing more.

But how may they be reestablished when the documents themselves contain not one particle of description upon which to proceed, and the witnesses to the location of the demarcation on the ground, if not mythical, are long since dead?

The master found that the lands reserved from the alleged grant were located east of a red line delineated on a map filed in evidence (made in A. D. 1895), beginning at a pile of stones. This pile of stones the master locates in these words: "About 40 feet east of the intersection of the roads from the Fish homestead and the King's road was, until lately, a pile of stones; about 12 feet north of this was another pile of stones, which pile of stones marked the southwest corner of the King's quarries and *the reservation in the grant to Fish.*" "The lands embraced within (east of) this line and between the old Spanish light-house and the pile of stones to the sea beach are the lands known as the King's quarries and

the lands that were marked off and reserved from the grant to Fish" (p. 55 of record).

These historical facts are interesting and of the utmost importance in the determination of the matters referred to the master, but appellants' counsel has sought in vain for evidence in this record to sustain the above findings.

Certainly the testimony of Mr. Sanchez, if the same is competent evidence, does not establish more than that he had had pointed out to him, by whom it is not known, the tract of land lying east of a line drawn between the old light-house and a pile of stones near the junction of two roads, as what was "known" as the King's quarries. He does not say at what time it was known as the King's quarries, whether before Sarah Fish so designated in her petition or not. No such designation appears in the title papers.

But appellees' own witness, Harrington, in spite of strenuous efforts of counsel to prevent it, completely demolishes the evidence of Mr. Sanchez. Harrington, shown by the record to be living on Anastasia Island, testified that the quarries were *west* of the red line of Hopkins's map (p. 148 of record).

The Coast Survey map, showing the topography of the island, delineates the roads, and the testimony of Hopkins and Colee establishes that the road running north and south runs about in the middle of the ledge of rock, and it is shown that this road is considerably west of the red line marked by Hopkins's map (pp. 117, 148–200 of record). Thus it is apparent that Mr. Sanchez has fallen into an error, probably an unintentional change of the word "east" for "west."

There can be no question about this error in his testimony, for the witness, Harrington, and others testify that east of the red line is sand to the seabeach. If there existed a rocky shore on the ocean beach along the Florida coast, it would have been a matter of public notoriety.

But if, as the master reports, the reservation was distinctly marked off in A. D. 1795, the evidences of such segregation had been lost at the time Florida was ceded to the United States. The agreement between Lieutenant Tuttle, U. S. A., and Gabriel W. Perpall in evidence, complainants' Exhibit H recites that at its date (September, A. D. 1833) a certain portion of the quarries (plural) on the island of Anastasia were claimed by the heirs of Fish, and a difference of opinion existed as to the location of the lines between the property of the United States and that which "appertains to the estate of Fish," and that the officer of the United States had called upon the representatives of the Fish estate *to point out, fix, and establish the bounds of their claim, which it was found difficult to do without great delay*, therefore it was agreed that Lieutenant Tuttle might cut stone upon any part of Anastasia Island provided *he shall not cut stone south of a stake set 298 chains and 12 links* (*nearly 4 miles*) on the road south of the light-house (p. 259 of record).

Mr. Perpall, the administrator of Fish's estate, and who appears in the reports of the land commissioners to have been a man having much to do with Spanish grants

in Florida, considered it would be difficult in A. D. 1833 to fix, point out, and establish the bounds of the reservation in the alleged grant, but sixty years later these difficulties vanish as dew before the summer's sun, and the reservation is placed on the sand dunes along the coast for 2 miles or more, east of a line located by testimony evidently in error, but founded on the memorial of Sarah Fish in A. D. 1824.

The master reported to the court "that previous to this decree and grant of 1795, the *said lands* had been laid off and segregated to the father of the said Fish, the exception of the King's quarries and reservation having *at that time* been previously separated and their boundary defined from the balance of said island" (p. 60 of record). Appellants contend there is no competent evidence in the record upon which to base this finding, but if there were, it furnishes no aid to the important inquiry what land was segregated from the public domain by the stakes set up by Solano one hundred and two years ago. Appellees can sustain their grant by a confirmation by the United States of the staking out upon the ground of a grant made, or they can rely upon their title papers without confirmation by the United States for the lands which the title papers themselves describe. They have come into court on their title papers, yet they seek by a survey to establish the boundaries of an undefined reservation alleged to have been marked on the ground one hundred and two years ago. The method of proof of the designation of the boundaries of a grant in East Florida by

delivery of possession in presence of a notary is contrary to the entire consensus of authority. This is specially important since this alleged delivery of possession was never confirmed. Even under the liberal (improvident) policy adopted by the board of land commissioners, if no certificate of a survey made under the Spanish Government was presented with the claim the board presumed the lands were never surveyed and rejected the claim. (Vol. 4, American State Papers, p. 202, G. and S. ed.)

The rule governing these grants has been often enunciated by this court. It has been distinctly decided in the Florida cases that the land claimed must have been severed from the general domain of the King by some grant which gives it locality by its terms. In such case a survey might be made after the time fixed in the treaty. (*Smith* v. *United States*, 10 Peters, 331.)

In the Buyck Case this court says if the grant were free of conditions, and proof made of its execution, still it could convey no land for want of ascertainable locality because not surveyed. (*Buyck* v. *United States*, 15 Peters, 215, p. 223.)

In the case of Acosta it is pointed out that in East Florida the surveyor-general was the authorized officer to sever the land granted from the public domain, and that he must act before the grant would be binding on this Government.

United States v. *Acosta*, 1 How., 24 (11–34).
United States v. *Lawton*, 5 How., 10 (12–35).

In the Lawton Case the decision of Judge Bronson upon the question of the survey marked by unlocated

stakes set is found on page 13, and is instructive. There a survey had been actually made, but the court refused to recognize it because not made by the duly authorized public officer, although the land had been granted in absolute property.

In the case of King the court says:

> The right of the defendant in error must stand altogether upon the instruments executed in 1795 and 1797. * * * It has not the aid of any authentic survey to ascertain and fix the limits of the land. * * * The instruments themselves contain no lines or boundaries whereby any definite and and specific parcel of land was severed from the public domain. It has been settled by repeated decisions of this court, and in cases, too, where the instrument *contained clear words of grants*, that if the description was vague and indefinite, as in the case before us, and there was no official survey to give it a certain location, it could create no rights of private property on any particular parcel of land which could be maintained in a court of justice. (*United States* v. *King*, 3 How., 786.)

In the case at bar there is no competent evidence that the lands described in the bill as claimed by these defendants are not part of the reservations made in the alleged grant. The bill says they are not, but this averment is not sustained by evidence.

In 8 How., 309, this court says:

> As Carre's claim was not surveyed before the confirmation took place, no boundaries of his tract could be recognized when the public surveys were made. * * * If from these (evidences filed with the

recorder) the tract could not be laid down on the township surveys, then the land could not be reserved from sale, although by the concession and by notice a particular spot was referred to in general terms as the place where the lands should lie. *Menard* v. *Massey*, 8 How., 309 (12–1092).

That is this case. From the boundaries in the title papers no tract could be laid down on the public surveys, and hence no land was recognized or reserved by the treaty itself. By the act of 1827, section 12, the claimants had an opportunity of removing this difficulty, if there existed a grant of any particular tract of land; in fact, they were required by that act to furnish evidence of the bounds of their claim to the surveyor of lands for Florida, and to do so within one year.

Where the documentary evidences of title produced by the claimant contain no sufficient lines or boundaries to show that any definite parcel of land was severed from the public domain, the universal rule, as settled by repeated decisions of this court, is that the concession in such cases creates no right of private property in any particular tract of land which can be maintained in a court of justice without an antecedent survey. *Maguire* v. *Tyler*, 8 Wall., 650 (19–323). In cases of vague description this court has uniformly held that no particular land was severed from the public domain by the grant and that no survey could be ordered by the courts of justice. *Villalobos* v. *United States*, 10 How., 557 (13–537). A grant unaided by a survey did not separate the land from the public domain. If it can not now from its uncertainty be located, it is not a grant for any specific lands. *Denese* v. *Ruggles*, 16 How., 243 (14–922).

But the master reported to the court:

> The land granted was an island well known and defined by name; it therefore required no survey, as the grant of such *by name* in itself sufficiently segregated it from the royal domain, and more effectually than any survey could have done (p. 71 of record).

Where in the record is there found any grant of Anastasia Island by name? If the grant was, as stated, an island well known by name, why is the grant expressed "as the said land which his father possessed," with no mention of the island by name? For it will be found that from one end to the other of the title papers there is no mention of the island of St. Anastasia save only in the testimony of Solano, in these words: He is certain that Fish "possessed *in* the island called St. Anastasia the plantation called the Orange Grove." The alleged grant not only does not make a grant of the island of Anastasia by name, but it does not in any single word refer to it by name or otherwise.

But the master further reports, in favor of the definiteness of the alleged grant, "there was only reserved from the grant *a small portion* of the island, which reservation was at the time well known and defined, having been previously laid off and separated from the rest of the island by the previous act of the Government, previous to this grant" (p. 71 of record).

Where is there one scintilla of evidence as to whether the reservation made in the grant, "the reserve of the

quarries," "and the remainder which the King has reserved," was but a small portion of the island?

As to this reserved portion having been previously laid off by the previous act of the Government, "previous to this grant," the only basis for this finding of the master is the testimony of the witness Solano, brought forward by Fish, and the recitation in the alleged grant by Morales that Solano, in the time of the old Spaniards, laid off by order of the Government the quarries to give the father of Fish possession, "as was affected," or, in other words, to give possession to what he possessed.

It will be shown later that the testimony of Solano and the recitation thereof by Morales are intrinsically incredible; but assuming that the recitation states a fact, how can it avail the appellees in this suit?

Basing their rights upon the title papers, which in terms reserves to the King the quarries, the remainder which was not granted to the father of Fish, and which the King reserved, and ordering a delivery of possession of the lands which the father of Fish possessed, how does it aid in determining now the dividing lines between what was granted and what was reserved, if it be a fact that in 1795 the citizen Solano knew what had been marked off as public domain prior to 1763?

It may be conceded, as the master reports, that the reservation was at the time well known and defined, and had been previously laid off, and yet we derive no aid in the determination now of the boundaries of the reservation set out in the language of the grant, or of that staked off by Solano one hundred and two years before the institution of the suit.

It is none the less necessary that there should have been a survey made and a description or plat of the lands reserved out of the insular body made of record. In the Perchman Case, although a concession in absolute property was made, yet the grantee thereafter petitioned for a survey, reciting his grant already made, and on this petition the governor indorses his order for a survey by the public surveyor. (*United States* v. *Perchman*, 7 Peters, 56.)

The master ignores wholly the necessity for any return of the alleged staking off and delivery of possession by Solano and its approval by the governor.

Appellants contend that if the language of the grant had been in these terms, "and there is granted to the said José Fish the island of St. Anastasia, in absolute property, with the reserve of the quarries and what the King has reserved," yet it would not have constituted a valid grant until the reserved lands had been duly laid off by an official survey, and such survey made of record, or by an unofficial survey and plat approved by the governor and made of record as an official determination of the bounds of the grant. Such approval would, by custom, have been evidenced by the issuing of a title in form. (*De la Croix* v. *Chamberlain*, 12 Wheat., 601.)

But even such approval would need to have been proved as a fact, since it would have been contrary to the custom and law of the province of East Florida. In this province there seems to have been no such thing as a judicial delivery of possession. Here there was by law a public surveyor whose duty it was to make a survey and record of all grants made by authority of the

King, and one Eastlake was regularly commissioned surveyor-general of East Florida September 20, 1791. (White's Recompilacion.)

Such was also the law and practice in West Florida. (2 White's Recompilacion, pp. 230–238, 239.)

See remarks of Mr. Chief Justice Taney in *Fremont* v. *United States* (17 How., 542) and of Mr. Justice Catron in *United States* v. *Lawton* (5 How., pp. 28, 29).

Appellees can derive no benefit in this suit from the alleged proof of boundaries, because it has never been approved by the governor, but if it had been approved it contains within itself no such descriptions as would be available without confirmation by the United States.

This court refused also to recognize a private survey in Buyck's Case, as also in the Hanson Case, and that while acting under the express direction of Congress and empowered to determine the boundaries of the grants presented, which authority the court many times declared it would most liberally construe in favor of claimants.

In the Hanson Case the court says, with reference to a private survey:

> It would have first have had to have been presented to the governor and extrinsic proof made that it was the land granted and lawfully made, * * * then the governor could have ordered a perfect title to issue. *United States* v. *Hanson*, 16 Pet., 201 (10–937).

A survey was required to be made and returned before a party could obtain a formal and perfect title. *Winter* v. *United States*, Hemp. (U. S.), 384.

If a party took possession but had no survey executed during the time Spain exercised jurisdiction, this being his own neglect, it lies upon him to establish the boundaries of his grant and to identify his land. *United States* v. *Boisedore*, 11 How., 96 (13–619).

But appellees say we identify our land by the testimony of Mr. Sanchez, and the master so reports. This is the language of the master's report:

> The master is of opinion that the boundaries of the reservation have been sufficiently established by the testimony *for all purposes of this suit*. From the testimony of Sanchez, who is a very old man and has been acquainted with the property for more than sixty years, and for a long period of time in possession of it as the agent of the heirs of Fish and in a position to know the location of such matters, it appears that there were two piles of stone at the intersection of the two roads on the island which Sanchez declares constituted the southwest corner of the King's quarries, and that a line drawn from these piles of stone to the site of the old Spanish light or lookout house and a line from the pile of stone eastwardly to the sea beach would comprise within these lines the reservation (p. 72 of record).

Now, where in the record of title or in the record at all, outside of Sarah Fish's memorial, is there any mention of the King's quarries? What knowledge has Mr. Sanchez of what lands were reserved in 1795, or what were laid off and staked by Solano? Solano says they "went, fixing up stakes to point out said boundaries, across the island." Mr. Sanchez admits on his cross-examination that he has no knowledge of the boundaries

of the reservation made at the date of the alleged grant. If the title papers themselves on their face fail to describe the lands reserved, then it could only have been done by a legal survey. If the demarcation made by Solano was a legal survey, it would be necessary to prove the boundaries as then pointed out. Mr. Sanchez does not pretend to be able to testify as to the land actually set off in A. D. 1795. It is evident that he bases his testimony upon the petition of Sarah Fish as printed in the American State Papers, vol. 4, page 465.

John Masters, the Government superintendent of works for seven years under Major Benham, U. S. A., in charge of building the sea wall at St. Augustine, says he never heard of the bounds of the King's quarries, and Rogero and Colee say they never heard of them. These witnesses have all occupied important public positions and their testimony is entitled to exceptional weight. But the testimony of their own witness, Harrington, refutes Mr. Sanchez's evidence completely. Harrington says the quarries extend 4 miles south from the Fish Island road, or more than 6 miles from the old light-house, and that he had heard that these quarries south of the road were for the use of the people and so laid off by the King.

There is absolutely no evidence in the record to sustain the description of the claim set up in the bill. The bill alleges title to that tract of land situate in townships 7, 8, and 9, range 30, known as St. Anastasia Island, *excepting therefrom what was known at the time of the Spanish grant, hereafter mentioned as the King's quarries*, the

boundaries of which were marked by stakes, the same being about 200 acres lying on the east of the old King's road, between the same and the old light-house. The pile of stones is located by the Hopkins survey in the SE. ¼ of SE. ¼ of sec. 28. East of the red line run from this pile of stone to the site of the old light-house embraces more than 600 acres of surveyed public lands besides an equal quantity of made lands yet unsurveyed. (See plat T. 7, R. 30 E.) There is no grant which by its terms corresponds with the description set out in the bill, and no testimony which assumes to state what was excepted in A. D. 1795. That the quarries or any quarries are east of the King's road is flatly denied by their own witness, Harrington, corroborated by Colee and other witnesses, and by the topography of the island as shown on the Coast Survey map in the record. Appellees attempted to explain this discrepancy in the area of the quarry by the erosion of the coast line in one hundred years, forgetting that the township map shows the lands as they were in A. D. 1834.

Appellees contended before the master that if the reservation was vague and undeterminable the reservation was void and the grant valid. See where this position leads? Themselves and the United States claim, under the King as the common grantor. All Florida, except what the King had before granted, was sold and transferred to the United States, and under the very rule they invoke the reservation by the treaty and the law of nations of the former grant of lands to the heirs of Fish is void

as an uncertain reservation out of the grant of the King to the United States, because their claim is Anastasia Island, except the public domain thereon, making such reservation vague and undeterminable.

While appellees are bound by this rule and their claim is void because of the indefiniteness of their alleged grant, the rule does not apply as against the United States, as the successor of the King, even by the principles of the common law.

The King's grants, proceeding from his bounty, have at all times been construed most favorably to the King, contrary to the grants of common persons.

Bacon's Abrid. Prerogative F.
Jackson v. *Reeves*, 3 Caine's Repts., 293–303.
Comyn's Dig., Grants G, 12.
Sir Walter Hungerford's Case, 12 Co., 86.

Appellants, however, insist that there was no intention to make a grant of property. The only words of grant in the Morales paper are these, "y se le concede en los terminos," which is translated "let them be granted to him on the terms above set forth," or by one translation "he is granted," which is nearer correct, for the verb is singular, and refers to the petition and not to the land; that is, to the possessory rights over the large tract of land.

The signification of the verb "concede" is important. It is not the word used in transferring an absolute right of property. In the absolute title issued to Bartolome Sintra (p. 364 of record) the granting word is the present indicative of the verb "dar," to give or grant. With

the verb "concede" it would have been necessary to use the phrase "en absoluta propriedad" to have made a conveyance in absolute property, and the verb would have had an object. For an object the phrase "la isla nombrada Santa Anastacia" (the island of Anastasia) would have been used if there had been an intent to grant the island. (See the concession to Perchman in absolute property, p. 54 of 7 Peters Reports.) The use of this expression "se le concede" is complete proof that there was no intention to make a grant of lands in absolute property.

The paper in its form was at most a concession of a possessory right of some character now not ascertainable, but whatever its form it purports to be executed by one Bartolome Morales,* political and military governor pro tem. (interino de ella). Appellees contend that this recitation in the title papers that Morales was acting pro tem. governor of the province is sufficient proof of his power to execute the instrument, and the master agrees therewith in his report. He says: "The grant is made by Bartolome Morales as political and military governor of East Florida, owing to the illness of the incumbent" (p. 68 of record). "The grant is attested by the licentiate, Ortega, and the notary" (p. 69 of record), this, like the remainder, being based on the assumption that Ortega's signature is genuine. There is an assumption that certain officials have subscribed these papers, and

*This Morales must not be confounded with Juan Ventura Morales, governor of West Florida and Louisiana.

then an assumption that they are genuine because so subscribed.

Appellants contend before this paper can be admitted as evidence of a grant of lands proof must be made of two facts—first, that Morales was acting governor by lawful authority and that Quesada, the governor appointed by the King, was deposed; and, second, that if Morales was acting in the place of Governor Quesada, it was by such authority and with such authority that he was empowered to make grants of land.

The presumptions attaching to the act of a public officer can never be invoked to sustain the act of the officer outside of the usual and recognized functions of his office.

Sheldon v. *Wright*, 7 Barb., 39.
International Ry. Co. v. *Prince*, 19 Am. St. Repts. 798.

No evidence of the existence of a condition calling for action by any person beside the lawful governor has been offered, or exists so far as known to counsel, and no record or matter of record has been produced indicating that Governor Quesada was not in the exercise of the duties of his office during the term of his incumbency outside of the mere recitations in the papers themselves. The recitations in the alleged grant itself are not evidence of the facts.

1 Eng. and Amer. Enc. Law, p. 969 (2d ed.).
United States v. *Hughes*, 13 How., 7.
United States v. *Cambuston*, 20 How., 59 (15–830).
Hughes v. *United States*, Sup. Ct., Oct. Term, 1897.

Ely v. *United States*, Sup. Ct., Oct. Term, 1897.
Branson v. *Worth*, 17 Wall., 32 (21–570).
First Unitarian Society v. *Faulkner*, 91 U. S., 415 (21–284).

Recitals are not evidence against one claiming adversely to one claiming under the party executing the deed (2 Phillips on Evidence, 4 Am. ed., note 476, p. 574, and many cases cited).

Where the recital points to higher evidence in the power of the party producing it, * * * the party will be held to account for the nonproduction of the higher evidence before the recital can avail him (that is, when otherwise under the rule it would be evidence).

In the case at bar, if Morales was acting governor there must have been record evidence of it. It is no excuse to say that now, after one hundred years from the event and seventy-five years from the change of flags, appellees can not discover such record evidence. The object of the law of 1828 was to afford to such claimants an opportunity to secure for their grants the aid of a confirmation, and to prevent just such a miscarriage of justice as has occurred in this case by long delay in the assertion of title, under the rules of evidence which indulge a presumption of the genuineness of documentary title from mere lapse of time.

This alleged grant purported on its face to have been made by virtue of the power held by Morales as governor. Before the instrument could be used in evidence this power must be shown.

Tolman v. *Emerson*, 4 Pick., 160.
2 Phillips on Evidence, 4 Am. ed., note 429, p. 472.

Until appellees had shown that Morales was an officer authorized to grant lands, even if they had established the fact that he was exercising the duties of the existing governor, the grants made by him were not evidence of title, but were void upon their face.

McGarrahan v. *New Iberia Co.*, 49 Cal., 332.
St. Louis Smelting Co. v. *Kemp*, 104 U. S., 836 (26–878).

The master sweeps aside all these rules of law and supplants them with an assertion of fact. "It is beyond question that Morales, on account of the illness of the governor was, during the latter part of these proceedings and at the time when the grant was made, acting political and military governor of the province, invested with all the powers and duties of such office; being therefore shown to have been the officer de facto, and recognized not only as such but as the officer de jure, it rests with the defendants to show to the contrary, which they have failed to do." (P. 70 of record).

In the courts a matter is beyond question only after competent evidence of the fact has been produced and admitted as evidence. Until some competent evidence is produced that Morales performed the duties of the office of governor of the province of East Florida, the assertion by the master that it was beyond question that he was the de facto governor must be deemed to be pure assumption. Appellants put in evidence the list of governors of the province of East Florida, showing that Quesada was governor from July 13, 1790, until July 20, 1796 (p. 197 of record). The master reports as a fact that Quesada was governor until 1795 (p. 59 of record).

The master is, of course, mistaken. Beside the evidence adduced there will be found in the reports of the land commissioners several grants of land by Quesada subsequent to June, 1795. (See Nos. 106 and 157 of cases reported in Report No. 1, vol. 4, American State Papers, p. 280, Duff Green ed.)

It would seem unnecessary to argue that even according to the principles of the common law Morales could not be deemed to be a de facto officer in the absence of evidence that he was performing the duties of the office, much more that such performance was under circumstances of reputation or acquiescence such as were calculated to induce submission to acts performed by him in the office he is alleged to have assumed.

State v. *Carroll*, 9 Am. Rpts., 409.
Wilcox v. *Smith*, 5 Wend., 231.
State v. *Murphy*, 32 Fla., 138.

He can not be held to be a de facto officer where the only official act shown to have been performed by him is the very act in dispute. A man doing a single act—in question—as an officer will not prove his commission.

Hall v. *Manchester*, 3 N. H., 295.
Rockhold v. *Barnes*, 3 Rand., 473.
Am. and Eng. Enc. Law, vol. 8, p. 784 (2 ed).

The only power possessed by a governor of a Spanish province to grant lands was vested in him as the King's subdelegate or deputy. It was held by the court in West Virginia that the idea of a de facto deputy is an absurdity. That it is to assume that there may be an

agent acting for and creating liabilities against a principal who has conferred no authority. (*Herring* v. *Lee*, 22 W. Va., 661.)

Morales could not be de facto governor while Quesado was de jure governor, performing the duties of his office.

Boardman v. *Halliday*, 10 Paige, 223.
Cronin v. *Stoddard*, 97 N. Y., 273–4.

Not having shown any color of title to the office in Morales, and it being apparent that all persons dealing with him during the presence at St. Augustine of Quesada, the lawful governor, must have known that he was not a legal officer, the appellees are not in a position to avail themselves of the rule that the acts done by this individual may not be inquired into.

Dabney v. *Hudson*, 24 Am. St. Repts., 276.
Vaccari v. *Maxwell*, 3 Blanch. (U. S.), 368.
United States v. *Alexander*, 46 Fed. Rep., 728.

The master cites as authority for his holding Morales was governor pro tem., 2 White's Recompelacion, page 270. A most unfortunate citation, if it be intended to show power in the governor to designate an incumbent for his own office, for the citation shows that when Estrada was appointed pro tem. governor he was required to produce as evidence of his right to perform the duties of the office an official letter from the captain-general of Cuba, under whose jurisdiction the two Floridas continued to be, and further shows that such evidence was presented in a formal manner and made of record in the Government archives.

Upon page 271 is printed a copy of the commission issued to Governor Coppenger by the King, by which it

appears that even with the King's commission he was not invested with possession of the office without the order of the captain-general of Cuba. The formalities and detail of the record evidence of his investure with office are set forth on page 272. The master has, perhaps, inadvertently misquoted the law from first White's Recompelacion, p. 371 (on p. 13 of the manuscript opinion, page 70 of record), as to the power in a governor to appoint subdelegates. The master says, "Defendants contend that while he (Morales) was the acting governor he was not the subdelegate, but this position is untenable, for all such powers were invested in the governor; and it is laid down in 1 White, p. 371, as to the powers of captains-general, *governors*, and viceroys, 'that they can act * * * all that the prince who named them might do.'" The text of the law (Book 5, chapter 13, p. 376, art. 2) as found in the volume cited, page 371, is that viceroys can act, etc.; the word governor is not found in the law. Further, no person would contend that the power to act by appointment from a superior gave power to a public officer to appoint to the office itself.

The principle upon which the acts of a deputy are sustained is the presumption of ratification by the principal. In the case at bar it can not be assumed that Morales was Quesada's deputy, for it is in evidence that Quesada exercised his office until July, A. D. 1796, and no ratification of the alleged acts of Morales are produced, and in fact outside of the documents produced in this case there is not one particle of evidence that Bartolome Morales ever performed any public duties in the province of

East Florida, and further, outside of the alleged grant to Fish, it has not been shown that any person by the name of Bartolome Morales was ever a resident of Florida.

The master attempts to sustain his report that the power to grant lands was lodged in the office of governor and not a personal trust, by citations from the decisions of this court. There can be no doubt that this court in the Arredondo case has gone to the extreme limit to sustain an official act of duly appointed officers of the Crown. The doctrine enunciated by the court has not been received without question by those most conversant with Spanish grants, and it has been questioned whether the court has not confused the limited powers of the governors with the unlimited rights existing in the King for the disposal of his own property, and this court, in 10 Peters, 731, admits the danger that lies in the doctrine and also the existence of laws and customs binding the King.

Investigation of the subject made subsequent to the decision in the Arredondo case has established beyond controversy the existence in the province of Florida of laws and ordinances regulating the disposal of lands.

There are two fatal objections to the application to this case of the doctrine enunciated in the Arredondo case and quoted by the master, that the disposition of the royal domain in Florida was within the discretion of the governors.

First, that language was spoken of the acts of the governor, the subdelegate of the King; and, second, the

doctrine was asserted in relation to a grant being adjudicated by the court under a statutory grant of power to this court to determine according to the stipulations of the treaty and the several acts of Congress in relation thereto in a controversy between the grantees and the United States, instituted by consent of the United States.

First, as to the acts of the governor.

In the case at bar the master assumes that Morales was de facto governor, and then, finding no law authorizing a de facto governor to grant lands, he assumes that the power to grant lands was conferred not on the governor, but upon the office itself (p. 70 of record). The doctrine laid down by the court in the Arredondo case is logical, if it be not correct. The court sustains the grants made on the theory of the omnipotent power vested in the person of the governor as the King's deputy or subdelegate.

Appellees may claim either theory: that there was power in the office of governor to grant, in which case such power must be evidenced by some law, or that the power being in the person of the governor as the King's deputy, there was no law binding him, and his discretion was unlimited, and if they hold a document of grant executed by the governor they are not required to produce any law to sustain it. Unfortunately for their case they produce no law investing the office of governor with the power; neither do they produce any document executed by any governor of the province.

To assume that the power to grant was attached to the office of governor, whoever might be temporarily acting,

and by whomever appointed, is to sweep aside all the court declare to be deduced as evidence of validity from the personal relation to the King of the granting officer.

There can be no question that the power to grant lands was a personal trust conferred by the King. The lands were his and not the property of the State, and the governors appointed by him were designated with the additional title of vice royal patron and subdelegate of the royal domain. In the case at bar Quesada so subscribes himself. Every royal title recites that it is made in the name of the King by virtue of his sovereign will. (8 Peters, 442.) It is in evidence that Quesada was the duly appointed governor at the time, and no evidence is produced that he either deputized Morales or confirmed his alleged acts. The finding of the master that Morales was governor is clearly erroneous.

Applicants contend that upon principle a subdelegate of the royal domain could not delegate his power to grant lands, and further contend that the burden of proof is upon appellees to establish the power. (*United States* v. *Power's Heirs*, 11 How., 579.)

Under the liberal principles of the common law such power could not be delegated. It was a personal trust. The duties of the governor in respect to the granting of lands were judicial as well as ministerial, and the proceedings in the case at bar purport to establish a judicial decree.

Shankland v. *Mayor, etc. of Wash.*, 5 Pet., 395 (8–167).

Warner v. *Martin*, 11 How., 224 (13–673).

1 Bacon Ab. Authority D.
Runkle v. *United States*, 122 U. S., 557 (30–1171).
1 Am. and Eng. Enc. Law (2 ed.), p. 972.
Newton v. *Bronson*, 13 N. Y., 587.

Appellants contend that if Quesada was incapacitated by sickness only routine duties could be delegated, and cite as authority:

Potter v. *Merchants' Bk.*, 28 N. Y., 641.
1 Am. and Eng. Enc. Law (2 ed.), 974.
See letter of Governor John Morales, 9 Peters, p. 144.

For proof that the governor *alone*, as subdelegate of the King, could grant lands we cite, for convenience of reference, 2 White's Recompilacion, pages 30, 50, 52, 57, 63, 104, 180, 245, 466, 473.

On page 57: The governor and captain-general of Florida shall be appointed by ourselves. (Laws of the Indies, Bk. 5, pt. 2, Law 1). On page 58: No one can exercise those offices but such as derive title from our royal person, etc.

Mr. White, in his reports to Congress, says: The intendant was denominated subdelegate of the King; he had special powers conferred upon him. (Clark's Land Laws, p. 1046.)

Throughout the entire discussion of the subject in the Arredondo case the attention of the court is directed to a power delegated by law to a public officer, and exercised in the name and by authority of the sovereign power. The principles there enunciated have no application to

acts performed by virtue of authority not shown to emanate from the sovereign power, but assumed by an incumbent of office in direct contravention of the laws governing the powers and duties of such officer.

The principles enunciated by this court in the Arredondo case moreover were declared with reference to a particular condition of affairs which no longer exists. That decision was made under a statute expressly laying down the rule of decision, which this court construed to be a direction to deal with the subject on the most liberal principles and to adjudge the questions according to the rules prescribed to the court by the political department of the Government.

The several acts of Congress relating to Spanish grants were considered by the court as giving to the paper titles a greater and more conclusive effect as evidence of a grant by proper authority, when the due and legal execution of the grant *by the proper officer was shown.*

The court says, on page 723 of 6 Peters's report, that under the Florida treaty, by the several statutes enacted, Congress had not required in such a case a production of the authority on which the grant was made, but has been content that the rights of the United States be surrendered by patent upon a grant produced, purporting to have emanated *under all the official forms and sanctions of the local government,* and on page 727 this principle is again stated; but on page 743 the court says, "Should we be called upon to decide on the validity of a title acquired by any Spanish grant not embraced by these laws (for the adjudication of land claims) we should

feel bound to follow the course pursued in *Foster* v. *Nelson* (2 Peters, 314)."

The same doctrine has been laid down in a late case, *Hayes* v. *United States*, October term Supreme Court, A. D. 1897.

The presumption of authority arising from the exercise of power applies against the sovereign only when it consents to be sued. (6 Peters, 714–732.)

Appellees entered the courts basing their rights upon the grant from a foreign sovereign without the benefit of any legislation by Congress. They escaped proving their grant by reason of their long delay, and yet they seek all the aids and benefits granted by Congress to those who promptly submitted their claims to adjudication when the United States consented to be sued.

Appellants confidently expect this court to enforce the rule enunciated in *Foster* v. *Nelson* and *Bouteller* v. *Dominguez* and visit upon appellees the penalties of their own laches.

The whole character of the instrument alleged to have been executed by Morales, on the 19th day of June, A. D. 1795, is such that the mind is impressed with the conclusion that it must either deal with some use of the lands not now understood or else it must be spurious.

It is too unreasonable for belief that a responsible officer of high rank would presume to deal with so valuable a property as Anastasia Island in the loose and careless way evidenced by this alleged grant. Not only

does it not set forth any single ground for a grant of title, but even the right to the possessory occupancy is based upon three alternative claims; and the recitation that Solano is proven to have laid off a reservation of the quarries in the time of the old Spaniards is so extremely preposterous as to destroy all title to credibility. Solano testified before the notary in A. D. 1795 that he was 46 years old, making his birth in 1749; the Spanish delivery of Florida to Great Britain was in 1763. Hence it would appear that Morales, acting governor of East Florida, subscribes to a declaration that a boy of 14 years of age laid off a valuable reservation of lands by order of the governor. Further, the only conclusion to be drawn from the language of the instrument is that Morales found, as a fact, from the testimony of three witnesses, that Fish, sr., possessed, in the time of the old Spaniards, 10,000 acres of land. It is universally admitted by all who have investigated and reported upon the subject that few, if any, grants of land were made prior to 1790—that is, until after the time of the old Spaniards, *and after diligent search of the abstracts of the claims confirmed in East Florida counsel has been unable to find a single claim bearing date prior to 1763.* It is incredible that the acting governor of the Territory should have treated a matter of such importance in the manner this instrument would make it appear.

With the copy of the title papers printed in the American State Papers there is found a receipt for 13,880 reals, equivalent to $1,735, paid by Fish, on April 12, 1792, *for the plantation called the Bergd* and a city lot.

Fish at that date certainly does not set up a claim to the whole of Anastasia Island. This receipt seems to be an official act and is entered in the archives as a record both of the sum paid and a description of the properties sold to Fish. It is not shown that this act was ever repudiated, and it is therefore evidence of what property Fish purchased at the sale. Its record makes the absence of any record of an official act investing Morales with the functions of governor the more noticeable.

Appellees have placed stress upon the fact that the board of land commissioners recommended the claim for confirmation, and they declared it is evidence of the validity of the title papers, and that the United States has recognized the validity of their claim to the extent of a league square; and hence the validity of their title.

Appellants contend to the contrary, and say that the second section of the act of 1828 expressly declares the confirmation not to be effectual without a release of all in excess of a league square of the claim confirmed, and it is admitted the claimants under Fish never made such release.

The master also reports, "irrespective of the treaty, the confirmation of this grant by the act of 1828 not only affirmed its validity, but in effect operated to confirm it to the full extent of the area of the land granted by the grant of Spain to Fish" (p. 83 of record).

To this we only need to say that if the master's conclusion be law all those persons who, like Arredondo, presented their claims for large grants to the courts under

the act of 1828, after they had been recommended for confirmation (as all but Perchman's were), must have been lacking in sound sense and legal acumen.

But it may be asked, How do we account for the approval of the claim by the board of land commissioners?

The answer to that question is best given by a reference to the six cases appended to the report No. 3 of this board on page 283, vol. 4, American State Papers. (Duff Green ed.; p. 571, G. & S. ed.)

NOTE.—While these six cases are appended to a report entitled as founded on royal titles it is apparent from the numbers, 1 to 6, preceding the cases as also the title on page 465 (Duff Green ed.; 697 G. & S. ed.), that these cases do not purport to have been founded on royal titles. Had these cases not been published under this heading, it is not improbable that the claim that the alleged grant to Fish was an absolute title would never have been advanced.

Of these six cases one was confirmed to George Murray, a member of the board, and the same land also confirmed to Symington, while no evidence of the grants was found in the archives (see 2 White's Recom., p. 378), and the two claims confirmed to Clarke and Delespine upon the alleged grant to Arambide have been declared of no validity by the court. This disposes of four of the six claims. The Fish claim is here before us in all its inherent weakness. The claim of Teresa Rodriguez alone remains, and the evidence submitted with this

claim shows that it purported to be but a concession. (See p. 471, vol. 4, American State Papers, Duff Green ed.; p. 705, G. & S. ed.) So that if the board ever placed it in a report of claims founded on royal titles they were guilty of fraud.

The character of these commissioners may be judged from their conduct, as set forth in the letter of Alexander Hamilton dated March 31, 1824 (vol. 3, American State Papers, p. 655), also by the fact above stated, that the board confirmed claims to its own members and to its secretary. (See No. 8, Rep. No. 7, p. 285–298, vol. 4, American State Papers.) In this case confirmed to the chairman of the board the original documents are reported as lost.

If the decisions of the board are entitled to respect, then it becomes incumbent upon appellees to explain how it is that the board confirmed to the heirs of Rodriguez and of Sanchez parts of this same alleged grant to Fish, contrary to the finding of the master, that the whole island, except a small portion reserved to the King, was granted to Fish in A. D. 1795, in absolute property. (Vol. 4, American State Papers, p. 214; vol. 5, p. 420.)

As to that portion of the master's report which finds the grant was confirmed by Congress, under the rule laid down in the case of *Slidell* v. *Grandjean* (111 U. S., 440), such confirmation in any event would be void, the commissioners having recommended a confirmation of a grant for 10,000 acres of land without naming any specific tract.

THE EVIDENCE THAT NO GRANT OF ANASTASIA ISLAND WAS EVER MADE TO FISH IS OVERWHELMING.

First. The alleged grant as set out, 10,000 acres made in 1795, is contrary to the laws and ordinances existing in the province of Florida at that date.

The answer, paragraph 30, averred that in A. D. 1795 the only law or ordinance in force in Florida authorizing grants of land was the royal order of 1790, and the averments of the answer were fully established by evidence. (American State Papers, vol. 3, pp. 624–626, Duff Green ed.; 726–727, G. & S. ed.; vol. 5, p. 747 et seq., G. & S. ed.; also printed 2 White's Recompilacion p. 272 et seq.; American State Papers, vol. 6, p. 55, G. & S. ed.; vol. 5, p. 372, Duff Green ed.) All the evidence proves that few grants were made prior to 1791. "How lands could be granted, and that by the governors themselves." (Report of December 13, 1827, American State Papers, vol. 5, p. 403, G. & S. ed.; report of R. K. Call, special counsel to Secretary of Treasury, in compliance with House resolution of February 23, 1835, vol. 8, American State Papers, p. 251 et seq.)

In reply appellees contend that the presumption arising from the grant itself has been declared by this court sufficient evidence of power in the granting officer, any law to the contrary notwithstanding. As before stated, this applies only to the acts proved to have been performed by the responsible official exercising the powers conferred upon him by the King.

Further, the principle has no application to a contest between titles emanating from a foreign sovereign and a patent issued by this Government. Here the question for decision is whether the heirs of Fish or the United States acquired title to these lands, and is a political question upon which this court may not indulge in presumptions as against the claims of its own sovereign.

Ely's Administrator v. *United States*, 170 U. S., p. —.
Slidell v. *Grandjean*, 111 U. S., 412 (28–329).

Second. This grant does not appear among the complete grants made by Spain in East Florida, and hence was not recognized by Spain at the time of the cession as a *title* to land.

See list of all real titles or patents to land issued by the governor of East Florida, page 261 et seq., Vol. 8, American State Papers, pages 159 to 164 of record.

This evidence alone should be conclusive. (*Lavergne's Heirs* v. *Elkins*, 17 La. Repts., 220.)

Appellees seek to avoid the force of this evidence by citing the holding of this court in *United States* v. *Augusoda* (1 Wall., 352). In that case Jimeno's Index was not in evidence, and it nowhere appears that there was proof that this index contained a list of all grants made.

The evidence in the case at bar is that all the royal titles existed in the office of the keeper of the public archives (p. 252; Vol. 8, American State Papers, p. 158) of record, and appellees have produced from the archives their title papers, which upon their face make an inciplent title.

Appellees objected that the reports and testimony printed as given by Alvarez, Segue, et al., were not evidence as against them, not being parties to the proceedings wherein such testimony was given.

The objection is not well taken. To prove custom, affidavits and evidence given in cases between other litigants is competent.

Bogardus v. *Trinity Church*, 4 San. Ch., 633.
1 Green Evidence, sec. 555.
Onsuega v. *Willings*, Peters C. C. (3 Ch. Pa.).

Moreover, this testimony and the reports have been printed as parts of public documents which this court may consult.

United States v. *Teschmaker*, 22 How., 392 (16–357).
New York Indians v. *United States*, 170 U. S.
Jones v. *United States*, 137 U. S., 202–214.

Third. Other grants of the same lands alleged to have been patented to Fish by the responsible officers of the King of Spain. (Exhibit Nos. 17 and 18, pp. 339–341 of record.)

By Exhibit No. 17, Governor Quesada, on February 15, 1793, one year after the sale of the Vergel, and two years before the alleged grant to Fish, made a concession to Rodriguez of 300 acres in the northern part of Anastasia Island within the lands the master finds to have been granted to Fish, which, after survey and proof of occupancy, was, in A. D. 1805, perfected into a royal title by Governor White, who enjoyed a reputation for great strictness in land matters, and it appears in the lis of complete titles furnished by Alvarez (p. 162 of record).

On July 3, 1802, Francisco Sanchez received a grant within the bounds of the lands claimed to have been granted to Fish in 1795. The petition of Sanchez describes the lands as vacant and "formerly occupied by the free negroes." Certainly, while not conclusive, this recitation is strong evidence that the lands had not been granted to Fish seven years before. Sanchez's lands were afterwards surveyed by the Spanish authorities as the King's lands, which is not only inconsistent with a former grant, but, under their land regulations, the most convincing evidence that there existed no former grant.

The master fails to mention the list of complete titles furnished by Alvarez, and, as to the two grants to Rodriguez and Sanchez, he says in his findings of fact (p. 62 of record), that "neither of said permits nor locations constituted a complete grant in absolute property, and both were without prejudice to a third;" yet it was in evidence before the master that the Rodriguez grant was in 1805 perfected into a perfect grant in absolute property.

This court has declared the law to be that a subsequent concession of a part of the same land is *conclusive* that no right was recognized by the former sovereign. (*D'Auteire* v. *United States*, 700 (25–871).)

Unless the English language has ceased to have meaning, the subsequent grants by those officers known to exercise the granting power under the King of Spain of parts of the same lands alleged to have been granted to Fish by Morales must establish that no title to the lands was ever made to Fish.

Fourth. A former grant of lands to Jesse Fish as a new settler, which was perfected into a royal title after the alleged grant by Morales. (Exhibits 13 to 16, pp. 318 to 338 of record.) It is significant that this grant to Fish of 500 acres appears among the complete titles furnished by Alvarez (p. 160 of record). The very report which appellees offer in evidence in this case, dated January 1, 1826 (p. 276 of vol. 4, American State Papers, Duff Green ed.), says: "There is one rule which the commissioners suppose it would not be unreasonable to apply in the adjustment of these claims. In cases where an application shall have been made for a grant of land as a remuneration for services, or other object embraced in the policy of the Government, and the grant shall have been made accordingly, if the same individual shall have made a second application * * * it would be no more than just to suppose the first concession was full and ample, unless otherwise recited in the grant itself, and the subsequent grant was an assumption of power not warranted by the laws and usages nor the policy of the Government."

But the recitations in the title papers of the 500-acre grant are conclusive evidence that Fish received no 10,000-acre grant on Anastasia Island. In his petition he declares himself owner of eight slaves. In 1818 Gabriel W. Perpall, as his administrator, the husband of his sister, and, as appears by the American State Papers, owner of many Spanish grants in Florida, applies to the governor for a title in absolute property to the heirs of Fish on this concession of 500 acres, but he seeks for

more land than the original concession because of the increase in slaves acquired by Fish since 1791, which he declares entitles Fish's heirs to 370 acres additional land (p. 325 of record). Now, what does Governor Coppinger say to this application for more land? That Fish has already had 10,000 acres granted to him upon his petition as a new settler and is not entitled under the law to more? No. He does not question *the right set up*, and makes a concession or grant for the 800 acres prayed, but later revoked his concession and declared the request comes too late as all the lands have been granted the Duke of Alagon, thus admitting that under the law Fish was entitled to 870 acres of land as a new settler (p. 336 of record). Would the governor have admitted in A. D. 1818 the right in Fish to 370 acres of additional lands by an increase of the eight slaves to thirteen if Fish had been granted the quantity authorized by an ownership of 400 slaves upon his petition to be granted lands as a new settler, which appears in this record?

In the proceedings in the 500-acre grant the law existing in the province requiring the issue of the complete title is set forth, and full proof in conformity to the law appears in the record. How can it be explained that in the case of the small grant for 500 acres the administrator sought before the transfer to the United States the evidence of his complete title, and made the proofs required by law, but neglected wholly to seek such a perfection of the rights of his intestate, and the evidence thereof in the matter of Anastasia Island if it was a

grant of land? The effect of this evidence is avoided in the master's report by the assertion that appellants' contention that lands could not be sold is not correct, and cites the case at bar as proof that lands were sold.

It has never been denied that judicial sales were made of private property. Upon the death of a resident of the province his estate was administered by the King. Appellants contend that the public domain could not be sold. In the case of Russell, No. 10 of report No. 3, page 283, vol. 4, American State Papers (Duff Green ed.), printed at length on pages 451 et seq., a special authority had to be obtained from the King to exchange lands for a vessel. If counsel may be pardoned for the digression, it will be interesting to note in this case that the document executed by Governor Estrada, dated July 8, 1812, recites the existing law as to the issuance of a royal title, that the same only issued after ten years of occupancy. The words are, "if he (Russell) thought proper to make a gracious present of the same (the schooner) to the King, in that case, as soon as he would take possession of the lands which he was to have as a new settler, the royal title to them would be immediately granted to him, which otherwise he was not entitled to until after having cultivated them ten years without intermission" (p. 452, vol. 4, American State Papers, Duff Green ed.).

The 500 acre grant to Fish, as a new settler, demolishes the foundation of the master's finding, that his father had received a grant of 10,000 acres in the time of the old Spaniards, to which Fish acquired a right by inheritance.

Fifth. No survey or plat was ever made of the 10,000 acre grant, but the grant to Fish of 500 acres was surveyed and the proper record found in the archives. Under the Spanish law a survey and possession were indispensable to the issuing of a title in form. (*Lavergne's Heirs* v. *Elkins*, 17 La. Repts., 220.)

Sixth. That no governor or responsible officer of the King would have dared to grant to an individual, much less to one so humble as Fish appears to have been, the island forming the defense of the Spanish possessions in East Florida.

By the law of the Indies no islands could be granted foreigners (p. 197 of record), nor could a grant be made of lands for settlement in any seaport, nor in any part which might at any time be prejudicial to the King. (Lib. 4, Tit. 7, Law 6; 2 White, Recompilacion, p. 46.) The circumstances attendant must be considered in construing the grant. (*Cavazos* v. *Trevino*, 6 Wall, 773.)

Seventh. This island of Anastasia only eight years prior to the alleged grant thereof had been the subject of a special report by the governor to the King, as a possession of great public importance to the entire province of Florida. (Exhibit No. 23, p. 346 of record.)

Eighth. Upon uncontroverted evidence the extent of the alleged grant is greatly in excess of any grant made by a governor until the time it became evident that Spain was about to turn over her possessions to the United States.

In the case of *United State* v. *Chaires Antonio Alvarez*, the keeper of the public archives, an official in the same office under Spain, testified, "the largest quantity of land confirmed by a royal (real) title previous to the year 1816 was to John McQueen (3,275 acres)." (Vol. 8, American State Papers, p. 252; pp. 279–280; pp. 157–158 of this record.) Of the grants of over 3,500 acres which were afterwards perfected into complete titles the concessions of but three, two to Huertas and one to Clarke, were made prior to 1815. (See list of Complete Titles, vol. 8, American State Papers, p. 251; pp. 159–162 of record.)

If appellees should contend that the list furnished by Alvarez does not contain all the complete titles issued, the American State Papers and the volumes of reports of this court are accessible to disprove the testimony of Alvarez, and also the fact above stated that but three concessions of over 3,500 acres perfected into complete titles are of earlier date than 1815. Further, counsel have diligently searched the reports, and such investigation discloses that during his term of office QUESADO GRANTED IN ABSOLUTE PROPERTY ONLY 5,382 ACRES OF LAND. Is it to be believed that during his illness the acting incumbent made one grant of double this area?

Ninth. That Fish never seemed to have asked for a title in absolute property for the lands, either in his purchase of the Vergel or on the alleged grant by Morales, while in all other cases the holder of a concession and the purchaser at a sale seek at the outset by the prayer of the

petition to obtain a title to the land, and in case of a concession file a second petition praying a title in absolute property to the lands granted.

Deed to Travers, vol. 4, American State Papers, p. 486 (Duff Green ed.).

Deed to Bartolome Sintra, p. 362 of Record.

Tenth. That Governor Coppinger, at the change of flags, made no mention of a private ownership of Anastasia Island, but expressly refers to it as a part of the King's domain to be delivered to the United States. (Vol. 2, American State Papers (miscellaneous), p. 878; p. 152 of record.) The attention of the court is called to this evidence, which will not be set out at length, for the sake of brevity.

Eleventh. That while Arredondo, claiming 4 leagues square of land, and all other claimants of immense tracts of land, whose grants were in as favorable a condition as this grant of Fish, after action by Congress of May 23, 1828, presented their title papers to the court and proved their execution (unless they escaped it by Aguila's certificate), yet the heirs of Fish, for some reason best known to themselves, declined to bring their title papers to the scrutiny of a judicial examination.

Many of these grantees, like Arredondo and Huertas, had gone to Cuba, yet the administrator of José Fish, Gabriel W. Perpall, appears by this record to have been a resident of St. Augustine, and the executors of Sarah Fish were before the board of land commissioners in this

claim, and by the extract from the county court minutes in evidence are shown to be undischarged at a time long subsequent to the expiration of the act of May 26, 1830.

It must be remembered that the superior court held its sessions at St. Augustine, in sight of the lands.

Twelfth. That Col. Robert Butler, who received the province of Florida from Governor Coppinger, should have extended the public surveys over Anastasia Island in A. D. 1834 as the surveyor-general of Florida and a resident of St. Augustine.

That Judge Putnam, residing at St. Augustine, was ignorant of the claim of Fish, and, as surveyor-general in A. D. 1852, approved the public survey of the lands of Anastasia Island. (See complainants' Exhibits I, J, and K, the township maps appended to the record.) The same surveyor-general approved the surveys of the two confirmed private land claims of Rodriguez and Sanchez. (Defendants' Exhibits Nos. 17 and 18.)

Thirteenth. That claimants never furnished evidence for the survey of their alleged grant, as required by section 12 of act of February 8, 1827. The agreement between Lieutenant Tuttle and the administrator of Fish only two years after the expiration of the act of 1828, as extended in 1830, recites that the United States had called upon Fish's representatives to fix and establish the bounds of their claim. (Exhibit H, p. 259 of record.)

Fourteenth. That claimants never presented their claim to the courts under the act of June 22, 1860, and its several extensions, as a complete title nor to the register and receiver as a concession.

Fifteenth. That claimants never registered their grant, as required by chapter 1492, Laws of Florida, as amended by chapter 1546.

Chapter 1492, laws approved January 4, 1866, required every person owning lands granted by Spain or Great Britain to file in the office of the circuit court for the county where the lands lay a description of the lands granted.

Sixteenth. Failure to object to the quarrying of stone for seven years, by orders of Major Benham, U. S. A., during the construction of the sea wall, or seeking compensation for the great amount of stone used by the Government in that work. (Testimony of John Masters, p. 184 of record.)

The truth is that in the days when claimants could have had incontrovertible evidence of title issued to them upon proof, they were unwilling to present their claim, but now that a great length of time has elapsed—a length of time that necessarily obscures all human evidence and deprives interested parties of the means of ascertaining the nature of the original transactions—they present their ancient title papers and claim every presumption of authority, regularity, genuineness, and effect.

Such laches are a bar to any rights that may have existed.

Underwood v. *Dugan*, 139 U. S., 380 (35–199).
2 Story, Equity, section 1520.

This principle receives additional weight as applied to transactions arising under a foreign system of laws and recorded in a foreign language. For these and other grounds appearing on the record the court erred in sustaining the findings of the master and in confirming his opinion over the objections of appellants, defendants below.

The sixth, eighth, and ninth assignment of errors may be argued together.

Sixth. The court erred in making the decree dated the 6th day of April, A. D. 1898, and in decreeing the relief prayed in the bill, or any relief.

Eighth. The court erred in refusing to dismiss the bill at the hearing for the following reasons:

(1) Because by a proper construction of the treaty with Spain and the acts of Congress for the settlement of land claims in Florida the statutes of the United States barred the claim of complainants.

(2) Because the claim presented, if genuine, was made without authority.

(3) Because the grant, if genuine, was an inchoate title.

(4) Because the concession presented was of an undefined and unsegregated quantity of land, and the exception not established.

(5) Because no sufficient possession was proved.

(6) Because complainants proved title out of themselves.

(7) Because the evidence showed the claim had been determined adversely to complainants, in a tribunal having jurisdiction of the subject-matter and parties, at the request of complainants.

Ninth. Error assigned. The court erred in refusing to dismiss the bill at the hearing.

Nearly all the specific grounds for dismissal set out under the eighth assignment of errors have been fully argued. The decision made upon appellee's claim of title by the land department remains to be considered.

The evidence showed the claim had been adversely determined by the Land Department on an adjudication sought by appellees.

It is proper here to note that this Government not only afforded every facility to the Florida claimants to prove their claims, but itself secured and made accessible the evidence to establish every valid claim.

During the great contest over the Forbes claim, involving over a million acres, this Government formally requested from the Government of Spain copies of all grants made in the two Floridas when under the Spanish Crown.

(See 2 White Recompilation, p. 363 et seq.)

It is thus apparent that in entering upon the investigation of any claim to lands under the former Government of Spain the officers of this Government were not left in doubt as to the facts.

Appellants offered in evidence a certified copy of proceedings had before the Commissioner of the Land Office and on appeal before the Secretary of the Interior in the claim of Charles M. Furman for lands on Anastasia Island under the alleged grant set out in the bill (Exhibit No. 12, pp. 308 to 318, of record); also the proof of notice to Furman, etc. (Exhibits 7–8, 9–10, and 11, pp. 297 to 308 of record), all of which were ruled out by the master as irrelevant.

Eliminating extraneous matters, the question for determination on this appeal is, whether because the grounds set forth in the decision by the land department for the rejection of the claim were the laches of appellees, evidencing an abandonment of their claim if originally valid; therefore the decision was not a bar to an assertion of the claim and a suit for the cancellation of the patents issued by this Government in the circuit court of the United States for the southern district of Florida.

Appellants contend that the decision of the land department was a complete bar, certainly on the allegations of the bill. This contention is strongly supported if not sustained by the inquiry, if it were otherwise why did Mr. Furman and Mr. Sanchez apply to the Department to adjudicate their claim and issue the patent? Had the decision sustained the claim would they have admitted that the State of Florida could have appealed to the courts to pass upon the acts of the honorable Secretary of the Interior if he had rejected the State's application to enter the lands as public domain under the act of June 9, 1880, and held the lands to be part of a private grant?

Appellants contend that the determination of the validity and bounds of a grant emanating from a foreign government when passed upon by the land department involves both questions of law and fact, and that such determination is not reviewable by the courts, except upon allegations of error of law or of fraud practiced.

The position of appellants is set forth in the opinion rendered by this court in the case of *Gonzales* v. *French*, in these words:

> As the claim was passed upon by the proper local officers of the land department, and subsequently on appeal by the Commissioner of the General Land Office, and upon a further appeal by the Secretary of the Interior, and as the result of the contest was the granting of a patent, the plaintiff *must aver and prove* either that the land department erred in the construction of the law applicable to the case; or that fraud was practiced on the officers, or that they are chargeable with fraudulent practices. *Gonzales* v. *French*, 164 U. S., 338 (41–458).

In the case at bar the bill simply avers the patents were void, because the United States had no title; a conclusion of law, and in any event a mixed question of law and facts which the evidence offered showed had been determined by a competent tribunal against the averments of the bill.

THAT THE LAND DEPARTMENT HAD JURISDICTION.

It may well be questioned, in view of the legislation upon the Florida claims passed by Congress, whether the land department could take jurisdiction of an uncon-

firmed claim and issue a patent thereon, but the United States alone could object where no private claim to the lands was involved; so the objection is not material in this case, so far as the grants to Rodriguez and Sanchez are not involved. Prior to the act of 1824 Congress alone could pass on such claims, wherever situated. *United States* v. *Lawton*, 5 How., 28 (12–35).

In 1860 Congress again allowed such claims to be adjudicated by a board when inchoate, and by the courts when complete, and this act continued in force until A. D. 1875, when it finally expired. Since 1875 there has been no other tribunal than the Land Department for the determination of whether or not lands within the territory derived from Spain were private, or passed to the United States as part of the Crown lands.

Upon the theory of appellee's bill this Fish claim has been confirmed by law (treaty), and therefore on their own contention it would be the duty of the Land Department to issue therefor a patent under section 2447, Revised Statutes. Exhibit No. 11 shows appellees made application for such patent (p. 307 of record). Under section 453 Congress has delegated to the Commissioner of the Land Office all executive duties in any wise relating to private land claims.

Upon these two sections the department may properly be deemed to have had jurisdiction of the subject-matter after the expiration of the several acts conferring power elsewhere to determine upon these claims.

United States v. *Arredondo*, 6 Pet., 732.
Cire v. *United States*, 98 U. S., 433.

Catholic Bishop v. *Gibbon*, 142 U. S., 161 (35-985–6–8.

Teschmaker v. *Thompson*, 79 Am. Decs., 157.

Knight v. *U. Land Ass.*, 142 U. S., 177–8 (35-979–80).

Orchard v. *Alexander*, 157 U. S., 372 (39–738).

That the Land Department was authorized to determine whether or not the lands were a part of the public domain, we cite:

United States v. *Clark*, 8 Peters, 436 (8–1001).

Menard v. *Massey*, 8 How., 294 (12–1096).

Langdeau v. *Hanes*, 88 U. S., 521 (22–618).

West v. *Cochran*, 17 How., 403 (15–115).

Newhall v. *Sanger*, 92 U. S., 294 (23–770).

Shipley v. *Cowan*, 91 U. S., 340 (23–427).

That the decision of the Land Department was final and binding on the parties before it:

St. Louis Smelting Co. v. *Kemp*, 104 U. S., 636 (26–878).

United States v. *De Repentigney*, 5 Wall., 268 (18–646).

McMicken v. *United States*, 97 U. S., 204 (24–947).

Astiazeran, etc., v. *Santa Rita L. Co.*, 148 U. S., 80.

Cath. Bishop, etc., v. *Gibbon*, 158 U. S., 168 (39–936).

Moore v. *Stinebach*, 127 U. S., 70 (32–55).

Lee v. *Johnson*, 116 U. S., 48 (29–571).

Johnson v. *Towsley*, 13 Wall., 72.

Vance v. *Burbank*, 101 U. S., 514 (25–929).

The circuit court, proceeding as a court of equity, had no jurisdiction to set aside the proceedings of a tribunal having special jurisdiction of the subject-matter.

Moores v. *Smedley*, 6 John Ch., 28.
Duchess of Kingston's Case, Smith's Leading Cases.
White v. *Coatsworth*, 6 N. Y., 137, p. 143.

Appellants contend that upon the title papers offered, if deemed authentic and valid, it was apparent to the judge that any determination of the claim of Fish by the Commissioner of the Land Office, as prayed by Mr. Furman, involved questions of fact, namely, whether or not certain of the lands were a part of the reserve or the alleged grant; whether or not the lands claimed to have been granted had been sufficiently segregated and identified at the time of the alleged grant, and whether or not after the change of flags the reserved lands were sufficiently identified to enable them to be set off from the alleged grant, and whether or not the claim had been abandoned if originally a valid grant.

There was one question of fact the finding of which by the Land Department, under the decisions of this court, determined conclusively the question of title in Fish's heirs, namely, whether or not there had been a survey of the alleged grant made by the authorized officials of the King of Spain.

As before stated, no statute or ordinance authorizing a segregation of the public domain by the act of private parties, attested in presence of a notary, even if there was proof of the genuineness of the document, is in evidence, or

has been found among the laws and ordinances existing in the province of East Florida. On the contrary, the existed at the period in question a duly appointed surveyor-general, with ordinances providing for the survey, plat, and record of all grants of land, even the scale of the plat being regulated by law. Not only are these plats found with all completed grants in the archives, but this court has determined as a matter of law that without such a survey there was no segregation of the lands and consequently claimant was not the owner of any particular tract of land. Take the case at bar, the most that could be said, upon proof of a complete title issued by a responsible official, would be that it is a grant of an undefined body of land. According to the contention of appellees it was Anastasia Island, except what was reserved. What was reserved? Why, what was marked off and not delivered. What was delivered? Why, what was not marked off and reserved; what his (Fish's) father possessed. It thus devolved upon the Executive Department to determine upon the petition of Mr. Furman if the lands could be now segregated. (See Remarks of Mr. Justice Catron in *United States* v. *Fremont*, 18 How., p. 40.)

Even if the Land Department had considered the case upon the petition of Mr. Furman, upon the rules adopted by this court under the act of 1828, where it held that Congress both authorized and required this court to adjudicate the titles "with full power and authority to hear and determine all questions arising in the cause relative to the title of the claimants, the extent, locality, and boundaries of their claim or other matters connected

therewith in a spirit of justice and national honor rather than according to strictly legal principles;" if it found that no survey had been made before the cession it would have been bound to decide that the claim of title was void. If the Department had adopted the treaty with Spain as its rule of decision, its conclusion must have been the same upon this question of fact, under the rules laid down by this court. Under the treaty this Government was bound to recognize complete titles, and to ratify and confirm all titles to the extent they would have been or were recognized as valid and binding by Spain. In other words, the United States were bound only to the same extent Spain would have been bound.

The rules of law applicable had been established in the decisions of this court, holding that in addition to the first concession, a survey and formal grant were necessary to invest the claimant with a title as against the United States.

United States v. *Forbes, 15 Peters,* 173 (10–705).
United States v. *Lawton,* 5 How., 11 (12–29).
De la Croix v. *Chamberlain,* 12 Wheat., 599, (6–742).
United States v. *Acosta,* 1 How., 24 (11–23).
United States v. *King,* 5 How., 773 (11–830).
Menard v. *Massey,* 8 How., 294 (12–1090).
Dautrive v. *United States,* 101 U. S., 700 (25–871).
United States v. *Miranda,* 16 Peters, 153 (10–912–13).
Maguire v. *Tyler,* 8 Wall., 650 (19–320).
United States v. *Delespine,* 15 Peters, 335 (10–758).

In the Delespine Case, which was one of the six cases reported by the land commissioners with the Fish Case, and which on the contention of appellees as to the title of the report was reported as a claim founded on a royal title (Report 3, Claim No. 6, vol. 4, American State Paper, p. 283, Duff Green ed., p. 571 G. and S. ed), this court held the lands vested in the United States for want of a survey.

We see no legal objection to the determination by the Commissioner of the General Land Office in a case brought before him upon petition of the claimant that certain acts deemed and declared by this court to be a prerequisite of title had not been performed, or that the title papers exhibited by claimant showed as a matter of mixed law and fact the omission of those prerequisites held by this court to be necessary to create a title in absolute property, and to create a private right; that the lands had not been segregated as a matter of fact and have, as a matter of law, passed to the United States, or that the claimant's form of title was not, as a matter of fact, a patent for land, but a mere first concession, which, as a matter of law, evidenced no title of private property; or that, as a matter of fact, claimants did not accept a recognition of their claim for a league square, nor present to the court their title papers for the larger area claimed, and hence, as a matter of law, an abandonment should be deemed to have taken place.

We do not pretend to say that the determination of the questions of law could not have been reviewed by proper averments in the bill, but that is not this case.

Having admitted the jurisdiction of the land department to determine whether or not the lands had been granted by Spain before the cession of the Floridas, they are bound by its adjudication made upon their own petition, in the absence of allegation of fraud or mistake of law.

Gelston v. *Hoyt*, 3 Wheat., 246.
Hopkins v. *Lee*, 6 Wheat., 113–114.

That the commissioner's reasoning may have been unsound, or that he may have assigned a wrong reason for his decision, does not operate to render the judgment any less of an estoppel, if the material issues in this case were necessarily decided by the former judgment.

The very controversy in dispute, namely, whether these lands claimed by appellants were the private lands of Fish's heirs, was tried and determined by the judgment of the land department, and its determination was a complete bar to this suit.

Aurora Hill Con. M. Co. v. *85 Mining Co.*, 34 Fed., 515.
Cragin v. *Powell*, 128 U. S., 691 (32–568).

The seventh error assigned is the court erred in decreeing any relief against the State of Florida, the real defendant in the suit.

Appellants contend that in reality this is a suit against the State of Florida.

The bill avers as follows: Your orators further show unto your honor that the State of Florida claimed title under the act of Congress * * * to certain lands

on Anastasia Island, etc. (p. 3 of record), also that the United States has issued to the State of Florida patents for the lands claimed to have been granted to Fish (p. 3 of record). The decree also declares null and void the patents to the State of Florida and also the selections and entries of the State of Florida (p. 98 of record).

The vesting in the board of trustees of the Internal Improvement Fund of the legal title to the lands owned by the State is claimed by appellees to remove this objection to the jurisdiction of the court.

The statute relied upon and set out in the bill is the act of the legislature of the State of Florida, approved January 6, A. D. 1855, entitled "An act to provide for and encourage a liberal system of internal improvement," chapter 610, Laws of Florida, and is found as sections 428 et seq., revised statutes of Florida.

The first section sets apart as a fund the proceeds of land sold and also all land granted the State under certain acts of Congress; the second section "for the purpose of securing a proper application of said fund" irrevocably vests in certain State officers as trustees the lands mentioned in the preceding section, to hold the same in trust with power to sell the same and invest the proceeds.

The master avoids the contention of appellants that the State is the real party in suit by holding that the State by creating the board of trustees of the Internal Improvement Fund and vesting in them its title to the lands permits them to sue and be sued, and therefore has no reason to complain of want of jurisdiction in the court (p. 85 of record).

No authority is cited for this holding, which is contrary to the statute creating the board and all legislation connected therewith up to the adoption of the revised statutes in A. D. 1891. It is evident throughout all the legislation relating to the subject that the board acted in all land matters as officers of the State.

See chapter 332, Laws approved January 24, 1851.
See chapter 610, Laws approved January 5, 1855.
See chapter 1138, Laws approved February 14, 1861.
See chapter 3154, Laws approved March 11, 1879.
See chapter 3155, Laws approved March 7, 1879.

The fourth section of chapter 1138 specially empowers the trustees to sue in the case provided for, and section 6 directs suit to be brought in the name of the trustees.

By chapter 3154 the governor and trustees are authorized to bring suit in the name of the State, and by chapter 3155 suit in the name of the State is directed and authorized to protect the State's interest in the lands granted the State by Congress, and to test claims against said lands, etc.

Trustees Internal Improvement Fund v. *Bailey*, 10 Fla., pp. 128, 132.
Trustees Internal Improvement Fund v. *St. Johns Ry. Co.*, 16 Fla., 543.

See remarks of Mr. Justice Westcott in *Trustees, etc.*, v. *J. P. & M. R. R. Co.* (16 Fla., p. 720), as to the residuary interest of the State in the Internal Improvement Fund.

The opinion of Mr. Justice Bradley in the case of *Florida* v. *Anderson* (91 U. S., 667) makes clearly apparent that the trustees are merely the agents of the State of

Florida, the State being the real owner of the lands in controversy in this suit. The paragraph of the opinion referred to is found upon page 297 of Book 23 of Lawyers' Co-op. edition.

That was a suit by the State of Florida, and it was objected that the State had not such an interest as to give it standing in court, because the fund was vested in the trustees of the Internal Improvement Fund. The court determined the matter in these words:

> It is apparent the trustees are merely agents of the State, invested with the legal title of the lands for their more convenient administration; that the State remains in every respect the beneficial proprietor * * * the fact that the trustees consist of the governor and other executive officers * * * shows, that they are mere public agents invested with an important branch of the State administration.

The case is cited and the interest of the State in the Internal Improvement Fund noticed in *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S., 196 (32–245).

There seems no doubt that the State of Florida, the patentee in the patents adjudged by the court to be void, is the real party in interest, the trustees being but its officers and agents and having no beneficial interest in the lands described in the patents, and that so far as the case is against the State the court had no jurisdiction by constitutional prohibition.

In conclusion it is a fact not to be lost sight of that appellants held title by patent from the United States,

which carried with it a presumption that all the legal requisites existed and had been fulfilled.

Bacon's Abrid. Prerogative, vol. 8, p. 151.
Bagnell v. *Broderick*, 13 Pet., 448.
Minter v. *Crommelin*, 18 How., 87.

Before the complainants in the court below were entitled to a decree it was necessary for them to have proved every one of the following contentions, and a failure to prove any one of them was fatal to their right to relief:

First. Jurisdiction in the court to entertain the suit and to afford the relief prayed.

Second. Possession in complainants sufficient to maintain a bill to remove a cloud on title.

Third. Title in complainants, assuming there existed a valid grant of lands in absolute property to Fish.

Fourth. A grant by the King of Spain or his lawful authorities.

Fifth. A royal title or title in absolute property.

Sixth. An official survey made of the granted lands prior to the change of flags, and a plat or other record evidence thereof.

Seventh. No bar to the action by statute, by res judicata, by laches, or otherwise.

Not only did appellees fail to prove each of these several grounds on which their right to relief was based, but they failed to prove any single one of them.

The court had no jurisdiction to entertain the suit, nor to afford the relief prayed; appellees did not have a sufficient possession of the locus in quo; the title to the

locus in quo was not in appellees; there was not any grant by the King of Spain or his lawful authorities; the grant at most was a concession, or inchoate title; there has never been an official survey or segregation of the lands alleged to have been granted, and no evidence of what lands purported to have been segregated in A. D. 1795, was before the court; and, finally, appellees were barred of their action by statute, by res judicata, and by their own laches.

We submit that appellees' evidence failed to meet, much less overcome, the presumptions in favor of the defendants as holders under a patent from the United States, and that the court erred in refusing to dismiss the complainant's bill upon each of the several grounds pointed out in the assignment of errors filed herein.

WILLIAM WHITWELL DEWHURST,
Solicitor for Appellants,
The Trustees, etc., and Horace S. Cummings.